14

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 14

OTTO MONSON, PLAINTIFF IN ERROR,

vs.

S. J. SIMONSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED JULY 20, 1910.

(22,268)

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No. 107.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

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a STATE OF SOUTH DAKOTA:

In Supreme Court, April Term, 1907.

2502.

S. J. SIMONSON, Plaintiff and Respondent,
vs.
OTTO MONSON, Defendant and Appellant.

Appellant's Abstract of Record.

Appeal from the Circuit Court of Roberts County.

Frank McNulty, Attorney for Plaintiff and Respondent.
Chester L. Caldwell and Howard Babcock, Attorneys for Defendant and Appellant.
[Stamped:] Supreme Court, State of South Dakota. Filed Mar. 18, 1907. Frank Crane, Clerk.

1 STATE OF SOUTH DAKOTA:

In Supreme Court, April Term, 1907.

S. J. SIMONSON, Plaintiff and Respondent,
vs.
OTTO MONSON, Defendant and Appellant.

Appellant's Abstract of Record.

This action was originally commenced in the Circuit Court of Roberts county by S. J. Simonson to quiet title to certain land situate in Roberts county. This appeal is taken from the judgment in favor of plaintiff from an order denying motion for new trial. Prior to hearing the motion for new trial the court made an order settling the following:

2 *Statement of Case Containing Exceptions.*

In this action plaintiff served and filed the following

Complaint.

Now comes the plaintiff and for his cause of action against the defendant herein alleges and shows to the court:

I.

That he is the owner and entitled to the possession of the following described premises, situated in the county of Roberts, state of

South Dakota, to-wit; the east half (E. ½) of the northwest quarter and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) and the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section thirty-two (32), in township one hundred twenty-five (125), north of range fifty (50), west of the Fifth principal meridian.

II.

That he is in possession of said land, and has been in such possession since the 10th day of July, 1905, and for a long time previous thereto.

III.

That the defendant Otto Monson, fraudulently and corruptly, and with intent to defraud plaintiff herein, did procure from one Henry A. Quinn, who is plaintiff's grantor of said premises, a cer-
3 tain contract for deed and a certain quitclaim deed purporting to sell and grant said premises to said Otto Monson; that said Otto Monson obtained said deed for a merely nominal consideration, and by using duress and threats against the peace and liberty of the said Henry A. Quinn.

IV.

That plaintiff claims title in fee to the said premises, and that the defendant claims an estate and interest therein adverse to said plaintiff.

V.

That the claims of said defendant are without any right whatever, and that the said defendant has not any estate, right, title or interest whatever in said land and premises, or any part thereof.

Wherefore, the plaintiff prays.

First. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of this court.

Second. That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said land and premises, and that the title of plaintiff is good and valid.

Third. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiff, and have such other and further relief as
to the court shall seem just and equitable, and for the costs
4 and disbursements of this suit.

FRANK McNULTY,
Attorney for Plaintiff.

Which complaint was duly verified.

To which complaint defendant interposed the following

Answer.

Defendant, for his answer to the complaint of the plaintiff in the above entitled action, respectfully states and shows to the court:

I. Defendant denies each and every allegation, and each and every part of each and every allegation of the plaintiff's complaint, except as is hereinafter specifically qualified or admitted.

II. Defendant admits that plaintiff is in possession of the land described in his said complaint, but alleges that said possession is wrongful, unlawful and without right.

III. Further answering said complaint, defendant alleges that he is the owner in fee simple absolute, and is entitled to the possession of the east half of the northwest quarter, the northeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section thirty-two (32) in township one hundred and twenty-five (125) north, of range fifty (50) west, of the Fifth principal meridian, Roberts county,
South Dakota; that plaintiff is in possession thereof without
5 right, and that he wrongfully and unlawfully withholds the possession of the same from the defendant. That under and in accordance with the act of congress, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes," approved February 8, 1887 (24 Stats, 388), a patent was duly issued on the 10th day of June, 1889, to one Henry A. Quinn, an Indian of the Sisseton and Wahpeton tribe or band, wherein and whereby there was allotted to said Henry A. Quinn the following described land, viz: the east half of the northwest quarter; the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two (32), in township one hundred and twenty-five (125) north, of range fifty (50) west, of the Fifth principal meridian in the territory of Dakota, containing one hundred and sixty acres, and whereby it was declared that the United States of America did and would hold the land thus allotted (subject to all the restrictions and conditions contained in the fifth section of said act of congress of February 8, 1887), for the period of twenty-five years, in trust for the sole use and benefit of said Henry A. Quinn. * * * and that, at the expiration of said period, the United States would convey the same, by patent, to said Indian. * * * in fee, discharged of said trust and free and clear of all charge or incumbrance whatsoever; that a true copy of
said patent, marked Exhibit "A," is hereto annexed and
6 made a part of this answer. That by the said fifth section of the said act of congress it is provided: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit

of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same *my* patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: provided that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Defendant further alleges that on the 3rd day of March 1905, an act was passed by the congress of the United States, entitled "An act making appropriations for the concurrent and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending
7 June 30th, 1906, and for other purposes"; that the said act, among other things, provided "That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the Fifth principal meridian, South Dakota"; that under and in compliance with the provisions of said act of congress, a fee simple patent, to the land therein described was, on the 29th day of June, 1905 (and not before that date), issued to said Henry A. Quinn; that a copy of said last described patent, marked Exhibit "B," is hereto annexed and made a part of this answer.

Defendant further alleges that afterwards and on the 10th day of July, 1905, the said Henry A. Quinn did, for a valuable consideration, make, execute and deliver to this defendant a good and sufficient deed, wherein and whereby the said Quinn did convey to this defendant all his right, title and interest in and to the land described in said patent, which said deed was thereafter duly recorded in the office of the Register of Deeds in and for Roberts county, South Dakota, on the 10th day of July, A. D. 1905, at 11 o'clock A. M., in Book "N," of Deeds, on page 299, and that ever since the said 10th day of July, 1906, defendant has been and now is the owner of the said land, described therein, in fee simple absolute.

Wherefore, defendant demands that plaintiff take nothing
8 by this action; that defendant have judgment that he is the owner in fee simple absolute, and is entitled to the immediate possession of the land described as follows, to-wit: the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two (32) in township one hundred and twenty-five (125) north, of range fifty (50) west, of the Fifth principal meridian, Roberts county, South Dakota; that plaintiff has no right, title or interest in and to said land or any part thereof; and for such

other and further relief as may be just and equitable; and for his costs and disbursements herein.

HOWARD BABCOCK,
Sisseton S. D., and
CHESTER L. CALDWELL,
505 *Germania Life Bldg., St. Paul, Minn.,*
Attorneys for Defendant.

EXHIBIT "A."

(Attached to Answer.)

163,063.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States a schedule of allotments of land, dated May 10, 1888, from the Commissioner of Indian Affairs, approved by
9 the Secretary of the Interior Nov. 17, 1888, whereby it appears that under the provisions of the act of congress approved February 8, 1887 (24 Stats., 388), Henry A. Quinn, an Indian of the Sisseton and Wahpeton tribe or band, has been allotted the following described land, viz.: the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, in township one hundred and twenty-five north, of range fifty west, of the Fifth principal meridian, in the territory of Dakota, containing one hundred and sixty acres;

Now, know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said act of congress of February 8, 1887, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section) for the period of twenty-five years, in trust for the sole use and benefit of the said Henry A. Quinn, or in case of his decease, for the sole use of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: provided, that the President of the United States may, in his discretion, extend the said period.

In testimony whereof, I, Benjamin Harrison, President
10 of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, this tenth day of June, in the year of our Lord one thousand eight hundred and

eighty-nine, and of the independence of the United States, the one hundred and thirteenth.

By the President:

[L. S.]

BENJAMIN HARRISON.
By M. McKEAN, *Secretary.*

Recorded Vol. 500, p. 199, Miscellaneous.

D. TYLER,
Recorder of the General Land Office ad Interim

EXHIBIT "B."

(Attached to Answer.)

199.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States an order of the Secretary of the Interior directing that, according to the provisions of the act of congress, approved March 3, 1905, a fee simple patent issued to Henry A. Quinn, a Sisseton and Wahpeton Indian, for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter, of section thirty-
11 two, in township one hundred and twenty-five north, of range fifty west, of the Fifth principal meridian in South Dakota, containing one hundred and sixty acres;

Now know ye, that the United States of America, in consideration of the premises, have given and granted, and by these premises do give and grant unto the said Henry A. Quinn, and to his heirs, the lands above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Henry A. Quinn, and to his heirs and assigns forever.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-ninth day of June, in the year of our Lord one thousand nine hundred and five, and of the independence of the United States the one hundred and twenty-ninth.

By the President:

[L. S.]

T. ROOSEVELT,
By F. M. McKEAN, *Secretary.*

Recorded, Miscellaneous, Vol. 577, pages 199, 200.

C. H. BRUSH,
Recorder of the General Land Office.

Which answer was duly verified by defendant.

Issue being joined, this cause was placed on the calendar
12 at the February, 1906, general term of said court, held at Sisseton, and was tried to the court, Hon. J. H. McCoy, Judge, without jury, on March 23, 1906; plaintiff appeared in person and by Frank McNulty, his attorney, and defendant appeared in person and by Howard Babcock, his attorney, and the following proceedings were had.

Evidence and Testimony.

Mr. OTTO MONSON was duly called and sworn as a witness for plaintiff, and testified as follows:

Direct examination.

By Mr. MCNULTY:

Q. Your name is Otto Monson?
A. Yes, sir.
Q. You are the defendant in this action?
A. Yes, sir.
Q. Have you the final patent to the land in controversy, which was executed by the President of the United States on the 29th of June, 1905?
A. Yes, sir.
Q. Will you kindly produce it?
A. Yes, sir.

(Witness then produced instrument which was marked Exhibit "1.")

Q. I ask you if Exhibit "1" is the final patent?
A. Yes, sir.

Exhibit "1" was then offered in evidence by the plaintiff, and received without objection, and is in the following words and figures:

13 "EXHIBIT 1."

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land Office of the United States an order of the Secretary of the Interior directing that, according to the provisions of the act of congress, approved March 3, 1905, a fee simple patent, issue to Henry A. Quinn, a Sisseton and Wahpeton Indian, for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter, of section thirty-two, in township one hundred and twenty-five north, of range fifty west of the Fifth principal meridian in South Dakota, containing one hundred and sixty acres;

Now know ye, that the United States of America, in consideration of the premises, have given and granted, and by these presents do give and grant unto the said Henry A. Quinn, and to his heirs, the lands above described: To have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Henry A. Quinn, and to his heirs and assigns forever.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the
14 twenty-ninth day of June, in the year of our Lord one thousand nine hundred and five, and of the independence of the United States the one hundred and twenty-ninth.

By the President:

[L. S.]

T. ROOSEVELT,
By F. M. McKEAN, *Secretary.*

Recorded, Miscellaneous, Vol. 577, pages 199, 200.

C. H. BRUSH,
Recorder of the General Land Office.

WILLIAM QUINN was then sworn as witness for plaintiff, and testified as follows:

Direct examination.

By Mr. McNULTY:

Q. Your name is William Quinn?
A. Yes, sir.
Q. Where do you reside, Mr. Quinn?
A. I live on the Sisseton Reservation.
Q. Live near Sisseton?
A. About two miles and a half north of here.
Q. You are acquainted with S. J. Simonson, the plaintiff?
A. Yes, sir.
Q. I show you "Exhibit 3," and ask you if you ever saw that paper before?
A. Yes, sir; I have seen it.
Q. Where did you see it before?
A. I seen it on the third of July.
Q. Under what circumstances did you see it?

A. Well, on the 3rd day of July, Mr. Simonson came down
15 to my house and got my brother and we went up to Mr. Simonson's office and he wanted a deed, and my brother gave him—handed the deed over to Mr. McNulty.

The defendant objected to the testimony as not responsive to the question, without foundation, the instrument not being in evidence, and moved to strike out the testimony on the same grounds. Which objection and motion the court overruled: to which ruling of the court defendant excepted.

Q. You may go ahead and state under what circumstances you saw it?

A. So my brother looked in his satchel and opened it and found this deed. It was drawn up in Minneapolis, and he took this deed to Mr. Simonson, and went along with Mr. Simonson up to Mr. McNulty's office on the 3rd day of July.

Q. What year?

A. 1905.

Q. What was done with this paper up there?

Defendant objected to question as immaterial and without foundation, the paper not being in evidence, which objection the court overruled; to which ruling of the court defendant at the time duly excepted.

A. Mr. McNulty put his seal on it—executed this deed and it was handed back to Henry Quinn, and Henry Quinn handed it back to Mr. Simonson, that is as far as I know.

Q. That was Henry A. Quinn?

A. Yes, sir.

Q. He is your brother?

16 A. Yes, sir.

Q. On the 3rd of July, 1905, in my office, you say Henry A. Quinn handed or delivered this deed to S. J. Simonson, did you?

Defendant objected to the question as leading, and calling for a conclusion; which objection the court overruled; to which ruling defendant then duly excepted.

A. Yes, sir.

By Mr. McNULTY: We now offer in evidence "Exhibit 3."

By Mr. BABCOCK: "Exhibit 3" is objected to by defendant for the reason that the same is incompetent and immaterial under the pleadings, and for the reason that the same is void under the laws of the United States, and under the laws of South Dakota, for the further reason that it appears to have been executed on the 30th day of May, 1902, and long prior to the issue of the patent in fee to the allottee, Henry A. Quinn, and for the reason the acknowledgment appears to have been changed and altered and the execution is not proven, and for the reason the deed had not been recorded. Which objection the court overruled, to which defendant then duly excepted, and "Exhibit 3" was received in evidence, and is as follows:

"EXHIBIT 3."

Warranty Deed.

Know all men by these presents: That Henry A. Quinn
17 (a widower) of —— county and State of Minnesota, party of the first part, for and in consideration of the sum of twelve hundred dollars, to him in hand paid by S. J. Simonson, party of the second part, the receipt whereof is hereby ac-

knowledged, do hereby grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, the following described real estate, lying and being in the county of Roberts and state of South Dakota, to-wit: the east half (E. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) and northeast quarter (N. E. $\frac{1}{4}$) of southwest quarter (S. E. $\frac{1}{4}$) and northwest quarter (N. W. $\frac{1}{4}$) of southeast quarter (S. E. $\frac{1}{4}$) of section thirty-two (32), in township one hundred twenty-five (125) north, of range fifty (50) west, of the Fifth principal meridian.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining to the said party of the second part, his heirs and assigns forever. And the said party of the first part, for his heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said party
18 of the first part will forever warrant and defend?

And the said Henry A. Quinn hereby relinquish- his right of dower in and to the above described premises.

In testimony whereof, the said party of the first part has hereunto set his hand and seal this 30th day of May, 1905.

HENRY A. QUINN. [SEAL.]

Signed, sealed and delivered in presence of
JOHN McCARTY,
FRANK McNULTY,
Witnesses.

STATE OF SOUTH DAKOTA,
Roberts County, ss:

On this 3rd day of July, A. D. 1905, before the undersigned, a notary public in and for said county and state, personally appeared Henry A. Quinn (a widower), known to me to be the person who is described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

Witness my hand and notary seal, the day and year last above written.

[NOTARIAL SEAL.] FRANK McNULTY,
Notary Public,
Roberts County, South Dakota.

Q. I will ask you, Mr. Quinn, how you fixed the date as the 3rd of July, 1905.

A. We were going to the celebration, and we were going
19 to get ready and go, and that was on the 3rd of July, and I had a payment at the agency, and we went down in the afternoon.

By Mr. McNULTY: We offer in evidence "Exhibit 2," together with the endorsements thereon.

By Mr. BABCOCK: Objected to by defendant as being incompetent and irrelevant for any purpose, and as being absolutely void under the statutes of the United States; being apparently executed and acknowledged and recorded long prior to the issue of the patent in evidence to the grantor, Henry A. Quinn, and being absolutely void under the laws of the United States.

Which objection the court overruled, and admitted "Exhibit 2" in evidence. To which ruling of the court defendant at the time duly excepted.

"Exhibit 2" is as follows:

"EXHIBIT 2."

Warranty Deed.

Know all men by these presents: That Henry A. Quinn (a widower), of Ramsey county and state of Minnesota, party of the first part, for and in consideration of the sum of thirty-two hundred dollars, to him in hand paid by S. J. Simonson, party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, the following described real estate, lying and being in the county of Roberts and state of South Dakota, to-wit: the east half (E. ½) of the northwest quarter (N. W. ¼) and northeast quarter (N. E. ¼) of southwest quarter (S. W. ¼) and northwest quarter (N. W. ¼) of southeast quarter (S. E. ¼) of section thirty-two (32), in township one hundred twenty-five (125) north, of range fifty (50) west, of the Fifth principal meridian.

To have and to hold the same, together with all the hereditaments and appurtenances thereunto belonging, or in anywise appertaining to said part of the second part, his heirs and assigns forever. And the said party of the first part, for his heirs, executors and administrators, do covenant with the said party of the second part, his heirs and assigns, that he is well seized in fee of the lands and premises aforesaid, and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted lands and premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all persons lawfully claiming, or to claim the whole or any part thereof, the said party of the first part will forever warrant and defend.

And the said Henry A. Quinn hereby relinquish- his right of

In testimony whereof, the said party of the first part has hereunto set his hand and seal this 31st day of May, 1905.

HENRY A. QUINN. [SEAL.]

Signed, sealed and delivered in presence of

THOMAS QUINN.

GEO. C. HORSWELL.

Witnesses.

21 STATE OF MINNESOTA,
Hennepin County, ss:

On this 31st day of May, A. D. 1905, before the undersigned, a notary public in and for said county and state, personally appeared Henry A. Quinn, known to me to be the person who is described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

Witness my hand and notarial seal, the day and year last above written.

[NOTARIAL SEAL.] H. P. NEWCOMB,
Notary Public,
Hennepin County, Minn.

Endorsed: 7007*a*.

STATE OF SOUTH DAKOTA,
County of Roberts, ss:

Filed for record this 2nd day of June, A. D. 1905, at 1:50 o'clock P. M., and recorded in Book Q, page 218.

I. STADSTAD,
Register of Deeds.
By AIMEE L. MacDONALD, *Deputy.*

Mr. S. J. SIMONSON, being sworn on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. McNULTY:

Q. Your name is S. J. Simonson?
A. Yes, sir.
22 Q. You are the plaintiff in this action?
A. Yes, sir.
Q. Are you acquainted with the defendant in this action?
A. No, sir; I am not.
Q. Never met him?
A. Not to my knowledge.
Q. Are you acquainted with the land described in the complaint as follows: The east half of the northwest quarter and the southeast quarter of the southwest quarter and the northwest quarter of the southeast quarter of section thirty-two (32), in township one hundred twenty-five (125) north, range fifty (50) west, of the Fifth P. M., located in Roberts county, South Dakota?
A. Yes, sir.
Q. You may state what your connection with that land is, if any?
A. It is mine.
Q. In whose possession is it—who has control and works this land?
A. I have.
Q. Do you remember when you took possession of it?

By Mr. BABCOCK: Objected to by defendant as incompetent and

not the best evidence, and for the reason that any possession acquired prior to the issue of the patent from the United States to Henry A. Quinn would be immaterial, and prohibited by the statutes of the United States, and absolutely void, and would not
23 give the witness or the plaintiff any right whatever either then or afterward to the land.

Which objection was by the court overruled. To which ruling of the court defendant then duly excepted and witness answered.

A. I don't exactly remember, but it was in June, I think.

Q. I will ask you if you remember distinctly it was in June?

A. I think I got possession of it the 31st day of May—I took possession of the land in June, because I know I hired plowing done on the land in June.

Q. Who did you hire to plow on the land?

By Mr. BABCOCK: All of this line of evidence is objected to on the grounds of the objection last stated.

Which objection the court overruled. To which ruling of the court defendant then duly excepted and witness answered.

A. I hired a fellow by the name of Robb to plow.

Q. I will show you "Exhibit 3," and ask you when you received that instrument from Henry A. Quinn, if you ever received it?

Objected to by defendant as being incompetent, irrelevant and immaterial, for the reason that the instrument, "Exhibit 3," is apparently executed prior to the time patent was issued from the United States to Henry A. Quinn, the grantor, and is therefore void
24 under the statutes of the United States, and would give the plaintiff in this case no right or claim to the land, and would not in any way tend to support the contention of the plaintiff in this action, and would not even be color of title.

Which objection the court overruled. To which ruling of the court defendant then duly excepted and witness answered.

A. I received it on the 3rd of July, 1905.

Q. Who is in possession of that land at the present time?

A. I am.

Q. Have you been in possession of it ever since June, 1905?

Objected to by defendant as incompetent, irrelevant and immaterial, for the reason that any possession acquired by this plaintiff or anyone else prior to the issue of the patent by the United States is prohibited by the laws of the United States, and would not give any right or privileges to the plaintiff.

Which objection the court overruled. To which ruling of the court defendant then duly excepted, and witness answered.

A. I have.

Cross-examination.

By Mr. BABCOCK:

Q. You say, Mr. Simonson, that you took possession of this land about the 31st of May or the 1st of June?

A. Yes, sir.

Q. Have you erected any buildings thereon?

A. No, sir.

Q. Ever lived there?

A. No, sir.

Q. Anyone living there?

A. No, sir.

Q. From whom did you acquire possession or receive possession?

A. From Mr. Quinn, the former owner.

Q. Did you at that time, about the 1st of June, 1905, receive any possession from the Secretary of the Interior or the Indian office?

A. No, sir.

Q. You did not have any lease of the land approved by the Secretary of the Interior or the Indian office in any way?

A. I did not.

Q. You did not have any promise from the Secretary of the Interior or the Indian office to take possession of the land?

A. No, sir.

Q. Then, so far as the Indian office is concerned, you was simply a trespasser upon the land without permission of the Indian office or the Secretary of the Interior?

Objected to as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness.

Which objection the court sustained. To which ruling of the court defendant then duly excepted.

Mr. HENRY A. QUINN, being duly sworn as a witness for plaintiff, testified as follows:

Direct examination.

By Mr. McNULTY:

Q. Your name is Henry A. Quinn?

A. Yes, sir.

Q. Are you the identical Henry A. Quinn to whom was allotted the land which I have just read the description of to Mr. Simonson?

A. Yes, sir.

Q. Where do you reside, Mr. Quinn?

A. St. Paul, Minn.

Q. I show you "Exhibit 3," and ask you if that is your signature that is attached thereto?

Which question was objected to by defendant as incompetent, irrelevant and immaterial for the reason that said deed, "Exhibit 3," was executed and delivered prior to the time patent issued for this land, and at a time when the allottee Henry A. Quinn, had no authority to convey or encumber the land, that the date in the acknowledgment has been changed and altered, the deed on its face has been tampered with and is spurious, and the instrument has never been recorded.

By Mr. McNULTY: We withdraw the question.

Q. I will ask you if you ever had that instrument in your possession?

Which question defendant objected to upon the same grounds as last before stated.

Which objection the court overruled and defendant then duly excepted and witness answered.

A. Yes, I have.

27 Q. To whom, if anybody, did you ever give it to?

Which question defendant objected to on the same grounds as last before stated.

Which objection the court overruled. To which ruling of the court the defendant then duly excepted, and witness answered.

A. I gave this to Mr. Simonson.

Q. This S. J. Simonson, the plaintiff in this action?

A. Yes, sir.

Q. On what day did you give this deed to Mr. Simonson?

A. On the 3rd day of July, 1905.

Q. How do you remember the date?

A. Because we were making preparations to go down to the Sisseton agency to celebrate, and therefore we had to get ready on that day.

Mr. McNULTY, being duly sworn, testified in plaintiff's behalf as follows:

My name is Frank McNulty. I am a practicing attorney at law at Sisseton, N. D. I saw "Exhibit 3"; Mr. Simonson and Mr Quinn, Henry A. Quinn, came to my office on the 3rd day of July, 1905, and Mr. Quinn handed me "Exhibit 3" for me to take his acknowledgment, and I did so and returned "Exhibit 3" to Mr. Quinn, and Mr. Quinn then handed the same to Mr. Simonson, and Mr. Simonson handed some money to Mr. Quinn.

By Mr. BABCOCK: At this time the defendant objects to all

28 the testimony of this witness, for the reason that the same is incompetent and immaterial for any purpose, and for the reason that "Exhibit 3" appears on its face to have been executed prior to issue of patent for the allotment from the United States and is void, and has not been recorded in the Register of Deeds' office or elsewhere, and that the same is no notice to a subsequent or other purchaser, or to the defendant.

Which objection the court overruled, to which ruling of the court defendant then duly excepted.

By Mr. BABCOCK: At this time the defendant moves to strike out all the testimony of this witness on the same ground. Motion is denied, and exception duly taken by defendant.

Cross-examination.

By Mr. BABCOCK:

Q. Mr. McNulty, did Mr. Simonson—was Mr. Simonson with Mr. Henry A. Quinn at the time they came to your office, as you have stated?

A. I would not say whether he came up with him or not; they were both in the office.
Q. They were both there at that time?
A. Yes, sir.
Q. Did you prepare the deed at that time?
A. No, sir.
Q. Did you know who did prepare it?
A. No, sir.
Q. It is the handwriting of Mr. Simonson?
A. It seems to be.
Q. Was Jno. McCarty present at the time he took this
29 acknowledgment?
A. No, sir.
Q. Did you see Henry A. Quinn sign his name?
A. No.
Q. Did he sign it there at that time?
A. No.
Q. Was Jno. McCarty in your office at any time?
A. I don't know.
Q. Do you know who Jno. McCarty is?
A. No, I do not.
Q. Did you know any such a man in this country?
A. No, I did not, no.
Q. Who filled in the acknowledgment?
A. I did.
Q. That is in your handwriting, "South Dakota, Roberts, July 5th, Henry A. Quinn, a widower"?
A. Yes, sir.
Q. Whose handwriting is the figure "3" and the R. D. filing?
A. That is mine.
Q. Did you fill in the word "3rd" the same time you did the rest?
A. About the same time; I think I made a mistake and got the figure "2" in first.
Q. You did not do it right there, did you?
A. Yes, sir.
Q. Changed it with the same ink?
A. I don't remember whether it was the same ink; I took
30 the first pen I got ahold of to change it.
Q. You don't know where Henry A. Quinn signed it?
A. Not of my own knowledge.
Q. Don't know as he did sign it?
A. He said he did at that time, before I took his acknowledgment.

Mr. W. B. ROBB, being duly sworn on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. MCNULTY:

Q. What is your name, Mr. Robb?
A. W. B. Robb.

Q. Where do you live?
A. Sisseton.
Q. What is your business?
A. It is teaming and plowing, or anything of the kind.
Q. You are called a teamster?
A. Yes, sir.
Q. Own horses, and work with them?
A. Yes, sir.
Q. Are you acquainted with S. J. Simonson, the plaintiff in this action?
A. Yes, sir.
Q. And were acquainted with him during the month of June, 1905?
A. Yes, sir.
31 Q. Did you do any work for him, Mr. Simonson?
A. Yes, sir.
Q. Did you do any work for Mr. Simonson during the month of July, 1905?
A. Yes, sir.
Q. What was that work?
A. Plowing—some plowing.
Q. Where was this plowing done?
A. Done down by Peever, on what was called the Quinn land.
Q. What was known as Henry A. Quinn land?
A. Yes, sir.
Q. You could not give the description?
A. No, sir.
Q. When did you commence plowing there, if you remember?

Objected to by defendant as immaterial and incompetent and without foundation, for the reason that it is not shown Mr. Simonson had any right or title to the land, and his pretended possession in June was long prior to the issuance of the patent from the grantor to Henry A. Quinn, and was unlawful, and would give Mr. Simonson no title thereto.

Which objection the court overruled. To which ruling of the court defendant then duly excepted, and witness answered.

A. The 25th of June, 1905; I worked there a week or so, and after I got done with Mr. Simonson—I think I got done
32 with Mr. Simonson about the first of August, and I done some more plowing after that for another party.
Q. How much did you plow down there?
A. 98 acres.
Q. That is for Mr. Simonson on this land?
A. Yes, sir.
Q. From the 25th of June, at the time you commenced plowing, you were plowing every day?
A. Yes, every day—one day it rained, and I did not go down.
Q. With the exception of that one day, you was there every day?
A. Every day except Sunday.

Q. Are you acquainted with Otto Monson, the defendant in this action?

A. I am not.

Q. That is the gentleman sitting behind Mr. Babcock; have you ever seen him before?

A. Not that I remember of.

Q. You never saw him down there on the land while you was plowing there?

A. No, sir.

Q. He never went there and asked you any questions about who you was working for?

A. Not that I remember of.

By Mr. BABCOCK: At this time the defendant moves to strike out all the testimony of this witness, for the reason that the same is incompetent and immaterial, because the possession of Mr. S. J. Simonson appears to have been taken prior to the issuance
33 of the final patent, and in direct violation of the United States statutes, and was unlawful, and would give him no rights whatever to the land.

Motion is denied, and exception duly taken by defendant.

Direct examination.

By Mr. MCNULTY:

Q. I don't know whether I asked you how long you was on this land plowing for Mr. Simonson?

A. I think from the 25th until the 1st of August.

Q. You had how many teams plowing?

A. Just my own team.

Q. Just one plow, and you plowed 98 acres?

A. Yes, sir.

Plaintiff rests.

"Exhibits 4 and 5" are here marked.

By Mr. BABCOCK: At this time the defendant offers in evidence "Exhibit 4," being a certified copy of the allotment patent from the United States to Henry A. Quinn describing the land which is described in the pleadings in this action.

"Exhibit 4" was received in evidence by the court, over plaintiff's objection, and is as follows:

"EXHIBIT 4."

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, there has been deposited in the General Land
34 Office of the United States a schedule of allotments of land, dated May 10, 1888, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior Nov. 17, 1888, whereby it appears that under the provisions of the act of congress,

approved February 8, 1887 (24 Stats., 388), Henry A. Quinn, an Indian of the Sisseton and Wahpeton tribe or band, has been allotted the following described land, viz.: The east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, in township one hundred and twenty-five north, of range fifty west of the Fifth principal meridian in the territory of Dakota, containing one hundred and sixty acres;

Now know ye, that the United States of America, in consideration of the premises, and in accordance with the provisions of the fifth section of said act of congress, of February 8, 1887, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said fifth section), for the period of twenty-five years, in trust for the sole use and benefit of the said Henry A. Quinn, or in case of his decease, for the sole use of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: provided, that the President
35 of the United States may, in his discretion, extend the said period.

In testimony whereof, I, Benjamin Harrison, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this tenth day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of the independence of the United States, the one hundred and thirteenth.

By the President:

[SEAL.] BENJAMIN HARRISON.

By F. M. McKEAN, *Secretary.*

Recorded Vol. 500, p. 199, Miscellaneous.

D. TYLER,

Recorder of the General Land Office ad Interim.

By Mr. BABCOCK: I offer in evidence "Exhibit 5," being a deed from Henry A. Quinn to Otto Monson, together with the endorsement of the filing and recording thereon by the Register of Deeds of Roberts county, South Dakota, and the deed purports to describe the land described in the pleadings of this action.

"Exhibit 5" was received in evidence, over plaintiff's objection, and is as follows:

EXHIBIT 5.

This indenture, made this 10th day of July, in the year of
36 our Lord one thousand nine hundred and five (1905), between Henry A. Quinn (a widower), of county of Ramsey and state of Minnesota, party of the first part, and Otto Monson, of county of Ramsey and state of Minnesota, party of the second part;

Witnesseth, that the said part- of the first part, in consideration of the sum of ten ($10.00) dollars and other valuable consideration, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, release, convey and quitclaim, to the said party of the second part, his heirs and assigns, forever, all the following pieces or parcels of land lying and being in the county of Roberts and state of South Dakota, described as follows, to-wit: The east half of the northwest quarter (E. ½ of the N. W. ¼), the northeast quarter of the southwest quarter (N. E. ¼ of the S. W. ¼), and the northwest quarter of the southeast quarter (N. W. ¼ of S. E. ¼) of section thirty-two (32) in township one hundred and twenty-five (125) north of range fifty (50) west of the Fifth (5) principal meridian, containing one hundred and sixty acres, according to the United States government survey thereof, be the same more or less.

To have and to hold the above quitclaimed premises, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining to the said party of the second part, his heirs and assigns, forever.

37 In testimony whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

HENRY A. QUINN. [SEAL.]

Signed, sealed and delivered in presence of
WILL LAYMAN.
A. W. MITTON.

STATE OF MINNESOTA.
County of Traverse, ss:

On this tenth day of July, A. D. 1905, before me, a notary public in and for said county, personally appeared Henry A. Quinn (a widower), to me personally known to be the same person described in and who executed the foregoing deed, and acknowledged that he executed the same freely and voluntarily, as his free act and deed.

[L. S.] A. W. MITTON.
Notary Public, Traverse County, Minnesota.

My commission expires March 30th, 1910.

Endorsed 7319*a*.

STATE OF SOUTH DAKOTA.
County of Roberts, ss:

Office of Register of Deeds.

I hereby certify that the within deed was filed in this office for record on the 10th day of July, A. D. 1905, at 11 o'clock A. M., and was duly recorded in Book "N" of Deeds, on page 299.

[L. S.] I. STADSTAD.
Register of Deeds.

38 By Mr. BABCOCK: The defendant offers in evidence chapter 119, of twenty-four statutes at large of the United States, commencing on page 388 of the bound volume, which was received in evidence over plaintiff's objection, and is as follows:

CHAPTER 119.

An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in congress assembled, that in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty or stipulation, or by virtue of an act of congress or executive order, setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section.

39 To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: provided, that in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act; and provided further, that where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act; and provided further, that when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the

Indians making the selecti[illegible] Where the improvements of
10 two or more Indians have been made on the same legal subdivision of land unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: Provided, that if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reser-
11 vation, or for whose tribe no reservation has been provided by treaty, act of Congress or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotment provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be
of the legal effect, and declare that the United States does
12 and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory

where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. Provided, that the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, as far as practicable, apply to all lands in the Indian Territory, which may be allotted in severalty under the provisions of this act: And provided further, that at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such In-
43 dian tribe for the purchase and release of said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided, however, that all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education; And provided further, that no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead; or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the
44 tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious

society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employés in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States, who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osages, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys

mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as
17 to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

By Mr. BABCOCK: The defendant offers in evidence the Act of March 3rd, 1905, of the Congress of the United States contained in the statutes of the United States passed at the 3d session of the 58th Congress 1904-5, and appearing on pages 1067 and 1068, particular reference being made to that portion referring to patent issued to Henry Quinn, which was received without objection and is as follows:

That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the fifth principal meridian, South Dakota.

Approved, March 3, 1905.

Mr. MONSON, being recalled, testified as follows

Direct examination.

By Mr. BABCOCK:

Q. Mr. Monson, you are the defendant in this action?
A. Yes, sir.
18 Q. Are you the identical Otto Monson mentioned in the deed, "Exhibit 5"?
A. I am.
Q. From whom did you receive this instrument?
A. From Henry A. Quinn.
Q. At what place?
A. At Brown Valley, Minn.
Q. And in whose office?
A. Mr. Mitton's office, notary public.
Q. On what day, do you remember?
A. On the 10th of July, 1905.
Q. At the time you received that deed, state whether you had any

knowledge of any other deed having been given for said land since the issuance of the patent "Exhibit 1" issued on the 29th of June, 1905?

Objected to as incompetent, irrelevant and immaterial for the reason that the deed is a quit claim deed and the grantee is charged with notice by reason of the form of the deed, and for the further reason the evidence shows that the plaintiff was in possession at that time, and it is admitted in the answer that the plaintiff was in possession on the 10th of July, 1905.

Objection overruled and exception duly taken.

A. No, I had no knowledge of any other deed being issued.

Q. I will ask you whether you had any knowledge or notice that any one was in possession or claimed to be in possession of said land in any way whatever at the time you took that deed?

49 Objected to as incompetent, irrelevant and immaterial for the reason that the evidence shows that Quinn was actually in possession and immaterial whether this man knew it or not.

By the Court: Let your record show that the objection is overruled for the time being.

A. No, I have not.

Q. Mr. Monson, how long have you been acquainted with Henry A. Quinn?

A. About a year and a half.

Q. Mr. Monson, where did you have your first relations with this land or negotiations with Mr. Quinn in regard to this purchase?

A. About the 21st day of May, 1905.

Q. Where was that talk and negotiations?

Objected to as incompetent, irrelevant and immaterial and not within the issues of this case.

Which objection was by the Court sustained, to which ruling of the Court defendant then duly excepted.

Q. I will ask you to state whether or not at that time Mr. Quinn came to your office in the Germania Life Building, and requested you to buy this land of his as soon as he got his patent for the land?

A. Yes, sir; he did.

Q. What did he say to you?

A. He said that he had 160 acres of land near Peever, S. D., and said that he would like to have me buy it and he wanted the money in a few days, and I told him I was not in the land business, and I would have to look into it to—he was very persistent, and

50 said that the land was worth a good deal more than he asked for it and he wanted the cash, and anyone, he said—he said "You have lots of money, you can buy this and sell it on time and get a good profit, and I can get a better price than I offer to you if I sell it on time, and I want the money"; and I did not take any interest in it, and he came in a second time, and during the day talked the same way and then I asked him to give me the descrip

tion of the land and he said he would, that it was a mile and a half northeast of Peever, that is, as near as he could tell the description, and he came in a second time a day or two later and then he had the description, and in the meantime I inquired of the land around Peever and got an idea of the probable value, and I told him I could not agree to buy it, but I would not buy it until I had been up and saw the land anyway, and he said, "You go and look at the land, and I will pay you $50.00 for going and then you can buy the land." I told him if I go, I don't want to go on your money; I will go on my own money, and my own time, and I did go and look at the land and I was satisfied to buy it at the price that he asked and told him that I would buy the land at that price, but would not pay him the money until the patent had issued, and he said "the patent will be here any day now, I am looking for it every day.

Q. I believe you stated you did go up and look at the land at that time?

A. Yes, sir.

Q. You examined the land?

51 A. Yes, sir.

Q. About what time was that?

A. That was about the 26th of May, 1905.

Q. Was anyone on the land at that time?

A. No, there was no one on the land.

Q. Had any work apparently been done on the land that year?

A. No.

Q. It was all vacant and grown up to weeds and grass?

A. Yes, sir.

Q. About when did you go back to St. Paul to the best of your recollection?

A. On Decoration Day, May 30th, 1905.

Q. What did you do in regard to this land after going back?

A. Henry A. Quinn came into the office the second day after I came back, I think, and I told him that I would take the land at his price and he gave me a contract on it holding until the patent would issue, and received by him and patent delivered to me and at that time I was to pay him the full purchase price, and I believe I did pay him $15.00 at that time.

Q. At this time when you made the contract shortly after you came back from Peever?

A. Yes, sir.

"Exhibit 6" is here marked.

Q. I will ask you to examine "Exhibit 6" and state whether that is the contract you refer to as having been made between you and Quinn?

52 A. Yes, it is.

Q. It was the day he came into your office after you had been out and looked at the land?

A. Yes, sir.

Q. That is Henry A. Quinn's signature and your signature to the contract?

A. Yes, sir.
Q. You saw him sign it?
A. Yes, sir.
Q. And you signed it?
A. Yes, sir.

By Mr. BABCOCK: Defendant offers in evidence "Exhibit 6" for the purpose of showing the negotiations and transactions between the defendant and Henry A. Quinn, but we claim that this contract, however, had no force whatever with relation to the land.

"Exhibit 6" was received in evidence over plaintiff's objection and is as follows:

EXHIBIT 6.

This agreement, Made and entered into this Second day of June, A. D. 1905, by and between Henry A. Quinn of Ramsey County, Minn., party of the first part, and Otto Monson of Ramsey County, Minn., party of the second part.

Witnesseth, That the said party of the first part, in consideration of the covenants and agreements of said party of the second part, hereinafter contained, hereby sells and agrees to convey unto said party of the second part, or his assigns, by deed of Warranty
53 upon the prompt and full performance of said party of the second part, of his part of this agreement, the following described premises, situate in the County of Roberts and State of South Dakota, to-wit: The East Half of the North West quarter (E. ½ of N. W. ¼), the North East quarter of the South West quarter (N. E. ¼ of S. W. ¼), and the North West quarter of the South East quarter (N. W. ¼ of S. E. ¼) of Section thirty-two (32) Township one hundred and twenty-five (125) North, Range fifty (50) West of the fifth (5th) principal Meridian, containing one hundred and sixty acres according to the United States Government Survey thereof, be the same more or less. And the said party of the second part in consideration of the premises hereby agrees to pay said party of the first part, as and for the purchase price of said premises, the sum of Twelve Hundred ($1200.00) Dollars, in manner and at times following, to-wit: Fifteen Dollars before or at the execution of this contract, the receipt of which is hereby acknowledged, and Eleven Hundred and Eighty-five ($1185.00) within ten (10) days after the party of the first part has furnished to the party of the second part an abstract of title giving evidence of clear title, and U. S. Patent in fee simple, and to pay all taxes and assessments that may hereafter be levied or assessed upon said premises, but should default be made in the payment of said several sums of money, or any or either of them, or any part thereof, or in the payment
54 of said taxes, or any part thereof, or in any of the covenants herein to be by said party of the second part kept and performed, then this agreement to be void, at the election of said party of the first part. And in case of default by said party of the second part, in whole or in part, in any or either of the covenants of this agreement to be by him kept and performed, he hereby agrees upon

demand of said party of the first part, quietly and peaceably to surrender to him possession of said premises, and every part thereof, it being understood that until such default said party of the second part is to have possession of said premises. All the covenants and agreements herein contained shall run with the land, and bind the heirs, executors, administrators and assigns of the respective parties hereto.

It Is Mutually Agreed, by and between the parties hereto, that the time of payment shall be an essential part of this contract; and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

In Testimony Whereof, Both parties have hereunto set their hands and seals the day and year hereinbefore written.

HENRY A. QUINN. [SEAL.]
OTTO MONSON. [SEAL.]

Signed, Sealed and Delivered in Presence of:
I. N. SICKELS.
A. H. WILLIAMS

55 STATE OF MINNESOTA,
County of Ramsey. Town of St. Paul, ss:

On this 2nd day of June, A. D. 1905, before me, a Notary Public within and for said County, personally appeared Henry A. Quinn and Otto Monson, to me known to be the persons described in, and who executed the within instrument, and acknowledged that they executed the same as their free act and deed.

[L. S.] ARTHUR H. WILLIAMS,
Ramsey County, State of Minnesota.

My commission expires January 17th, 1910.

Endorsed: 7109*a*.

OFFICE OF REGISTER OF DEEDS,
COUNTY OF ROBERTS, S. DAK.

I hereby certify that the within instrument was filed in this office for record on the 13th day of June, A. D. 1905, at 1:20 o'clock P. M., and was duly recorded in Book 4 of Miscellaneous on page 393.

[L. S.] I. STADSTAD,
Register of Deeds.

Q. Mr. Monson, I believe you testified that you took the deed "Exhibit 5" from Mr. Quinn at Brown Valley on the 10th of July following after the patent was issued?

A. Yes, sir.

Q. I will ask you if that was pursuant to the agreement and negotiations with Quinn prior to that time?

A. It was.

56 Q. At the time you took the deed "Exhibit 5" at Brown Valley at that time, did you pay Mr. Quinn any money?

A. I did.

Q. I will ask you whether you paid the entire purchase price then or whether a portion of it was left unpaid on account of any contingency?

A. I paid part of it.

Q. Was there any part held back?

A. Yes sir.

Q. Have you paid him any part of that since that time?

A. Yes, sir.

Objected to as incompetent, irrelevant and immaterial.

Which objection the Court sustained; to which ruling of the Court defendant then duly excepted.

Q. Mr. Monson, at the time you took this deed from Mr. Quinn at Brown Valley, did you have the patent "Exhibit 1" at that time?

A. No.

Q. I will ask you whether you knew at that time it had been issued?

A. Yes, sir.

Q. I will ask you whether Mr. Quinn knew it, or whether he stated anything about the patent being issued.

A. He did not know it until I told him that day.

Q. You told him the patent had been issued?

A. Yes, sir.

Q. What, if anything, did he say in regard to the patent
57 or what he would do in regard to the patent?

A. He said he would deliver it to me when he received it from Washington.

Q. From whom did you receive the patent, when you did receive it?

A. Henry A. Quinn.

Q. At what place?

A. St. Paul.

Q. I will ask you if he brought it to you?

A. He did.

Q. When was that?

A. It was about the 17th of July, 1905, about a week after I got the deed.

Q. You have had it ever since?

A. Yes, sir.

Cross-examination.

By Mr. McNULTY:

Q. When and where did you pay any money to Mr. Henry A. Quinn since the 10th of July, 1905?

A. In St. Paul?

Q. Where?

A. At our office, or my office rather.

Q. As a matter of fact, Mr Monson, you received this patent from the private secretary of Senator Platt in response to a telegram you sent Senator Platt to send you the patent?

A. No, sir.

Q. You sent a telegram to Senator Platt and signed Henry A. Quinn's name to it, and to send the patent to you?

58 A. No, Mr. Quinn sent the telegram to the commissioner of the General Land Office at my request.

Q. To forward the patent to you?

A. No, sir; to Senator Platt of St. Paul.

Q. Now, as a matter of fact, Mr. Monson, you knew that Mr. Simonson had been negotiating for this land previous to the day you got the deed on the 10th of July, 1905, did you not?

Objected to as being prior to the issuance of the patent.

Objection sustained.

Q. Didn't you go over to Mr. Henry Quinn's house when you negotiated with him and secure his signature to this contract "Exhibit 6"?

A. No, sir; I did not.

Q. Do you know Mr. Pat Miller, Mr. Henry Quinn's son-in-law?

A. Yes, sir.

Q. Do you remember the time Mr. Pat Miller and I were up in your office in St. Paul about this matter?

A. Yes, sir.

Q. Didn't you state to Mr. Miller and myself at that time that you had gone over to Mr. Quinn's house and gotten this contract?

A. No, I surely did not because I did not get out at the house, and did not go there for it.

Q. Before the 10th of July, or at the 10th of July, 1905, you did not go down and look at the land to see who was in possession of it?

A. No, I did not.

59 Examination by Mr. BABCOCK:

Q. From whom did you get this patent "Exhibit 1," who handed it to you?

Objected to as having been asked and answered and incompetent, irrelevant and immaterial.

Which objection was by the Court sustained, to which ruling defendant duly excepted.

Mr. A. W. MITTON, being duly sworn on the part of the defendant testified as follows:

Direct examination.

By Mr. BABCOCK:

Q. Your name is A. W. Mitton?

A. Yes, sir.

Q. Where do you reside?

A. Brown Valley, Minn.

Q. What officer or official position do you hold there?

A. Notary public of that county.

Q. Notary in and for Traverse county, Minnesota?

A. Yes, sir.
Q. And were such notary on the 10th of July last?
A. Yes, sir.
Q. Have you an office there?
A. Yes, sir.
Q. Are you acquainted with Henry A. Quinn?
A. Yes, sir.
60 Q. The Henry A. Quinn who was on the stand here?
A. Yes, sir.

Q. You may examine "Exhibit 5" and I will ask you, Mr. Mitton, whether you ever signed that instrument—whether you ever saw that instrument before?

Objected to as incompetent, irrelevant and immaterial.

Which objection was by the Court sustained, to which ruling of the Court defendant duly excepted.

Q. I will ask you whether or not you saw Mr. Quinn execute that instrument?

Same objection by plaintiff.

Which objection was by the Court sustained, to which ruling of the Court defendant duly excepted.

Q. I will ask you if you saw Mr. Quinn and Mr. Otto Monson in your office on the 10th day of July, 1905.
A. I did.
Q. What did they do there that day?

Objected to as incompetent, irrelevant and immaterial.

Which objection was by the Court sustained, to which ruling of the Court defendant duly excepted.

Q. I will ask you whether or not before taking his acknowledgment you read over to Mr. Henry A. Quinn the entire contents of that deed, the exhibit you hold in your hand?

Same objection by plaintiff.

Which objection was by the Court sustained, to which ruling of the Court defendant duly excepted.

61 Defendant rests.

By Mr. McNULTY: At this time the defendant having rested, the plaintiff moves the Court to make findings in favor of the plaintiff and enter a judgment thereon in favor of the plaintiff.

Motion is granted.

To the granting of which motion the defendant then duly excepted.

Thereafter the Court made and filed the following

Findings of Fact and Conclusions of Law.

The above entitled matter coming on to be heard this 23rd day of March, A. D. 1906, before the Court, the plaintiff appeared in person and by his attorney, Frank McNulty, and the defendant appeared in person and by his attorneys Howard Babcock and Ches-

ter L. Caldwell, and witnesses having been sworn and testifying, and evidence having been offered and received and after listening to the arguments of counsel, and considering the files and records in the case and the testimony offered and received, and being satisfied in the premises, the court makes the following

Findings of Fact.

1st. That at the commencement of this action the plaintiff, S. J. Simonson, was and still is the owner and entitled to the pos-
62 session of the following described premises situated in the County of Roberts and State of South Dakota, to-wit: the east half (E. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) and the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) and the northwest quarter (N. W. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section thirty-two (32) in township one hundred twenty-five (125) north of range fifty (50) west of the Fifth Principal Meridian.

2nd. That the plaintiff S. J. Simonson, was in the possession of said above described premises at the time of the commencement of this action, and had been in the actual, continuous, notorious, open and adverse possession of said premises and every part thereof from July 3rd, 1905, until July 10th, 1905, and had been in the possession of said premises on July 10th, 1905, and ever since.

3rd. That on July 3rd, 1905, Henry A. Quinn was the owner in fee simple of the above described premises and on said 3rd day of July, 1905, said Henry A. Quinn, for a valuable consideration, made, executed and delivered a warranty deed, wherein and whereby the said Henry A. Quinn did grant, bargain, sell and convey unto the said S. J. Simonson, his heirs and assigns forever, the following described real estate lying and being in the County of Roberts, and State of South Dakota, to-wit: the east half (E. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$), and the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$), and the northwest quarter (N. W. $\frac{1}{4}$) of the southeast (S. E. $\frac{1}{4}$) of section thirty-two (32), in township one hundred twenty-five (125), north of range
63 fifty (50) west of the Fifth Principal Meridian, to have and to hold the same together with all the hereditaments and appurtenances thereunto belonging or in any wise appertaining, to the said S. J. Simonson, his heirs and assigns forever; and the said Henry A. Quinn, for himself, his heirs, executors and administrators, covenanted with the said S. J. Simonson, his heirs and assigns, that he, the said Henry A. Quinn, is well seized in fee of the lands and premises aforesaid and has good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrance; and the above bargained, and granted lands and premises in the quiet and peaceable possession of the said S. J. Simonson, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said Henry A. Quinn will forever warrant and defend.

4th. That said warranty deed, conveying said above described premises was duly executed and delivered on July 3rd, 1905.

5th. That on July 10th, 1905, the defendant, Otto Monson, procured from said Henry A. Quinn a quit claim deed whereby the said Henry A. Quinn did convey to defendant Otto Monson, all his right, title and interest in and to the land above described, which said deed was recorded in the office of the Register of Deeds in and for Roberts county, South Dakota, on the 10th day of July, 1905, and recorded in Book N of Deeds on page 299.

6th. That at the time said defendant Otto Monson, pro-
64 cured said quit claim deed to the above described premises from said Henry A. Quinn, said defendant Otto Monson, had notice of the rights of said S. J. Simonson in and to said above described lands.

7. That defendant has no estate, right, title or interest whatever in said lands and premises above described or any part thereof.

8th. That the allegations of plaintiff's complainant are in all things true.

9th. That the allegations of defendant's answer are not true.

10th. That — all times involved in this action the defendant Otto Monson, had notice and knowledge of the rights of plaintiff in and to the above described premises, and each and every part thereof.

And based upon the foregoing Findings of Fact the Court makes the following

Conclusions of Law.

1st. That at the commencement of this action the plaintiff was and still is the owner of and entitled to the possession of the following described premises situated in the County of Roberts and State of South Dakota, to-wit: the east half (E. ½) of the northwest quarter (N. W. ¼), and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼), and the northwest quarter (N. W. ¼) of the southeast quarter (S. E. ¼) of section thirty-two (32), in township one hundred twenty-five (125) north of range fifty (50), west of the Fifth Principal Meridian.

65 2nd. That the defendant has not and never had any estate, right, title or interest whatever in said above described land and premises or any part thereof.

3rd. That the title of plaintiff to said above described premises is good and valid.

4th. That the plaintiff is entitled to a decree quieting title in and to the above described premises in said S. J. Simonson, and enjoining and debarring the defendant forever from asserting any claim whatever in or to said land and premises adverse to the plaintiff.

5th. That the plaintiff is entitled to his costs and disbursements in this action.

Dated March 26th, 1906.

By the Court:

J. H. McCOY, *Judge*.

Attest:

L. WM. FOSS, *Clerk*,

By AIME MacDONALD, *Deputy*.

Which Findings are endorsed as follows: Office of the Clerk of Courts. Roberts County, S. D. Filed Apr. 5, 1906. L. Wm. Foss, Clerk.

To which said Findings and each of them, the defendant at the time duly excepted, and said exception was allowed by the Court.

Thereafter the Court made and rendered the following judgment in said action:

66 *Judgment.*

The above entitled cause having been tried to the Court without a jury on the 23rd day of March, A. D. 1906, the plaintiff appeared in person and by his attorney Frank McNulty, and the defendant appeared in person and by his attorneys Howard Babcock and Chester L. Caldwell, and evidence having been offered and received, and after listening to the arguments of counsel, and having considered the pleadings, files and records in said cause, and the testimony offered and received, and being satisfied in the premises, now, on motion of Frank McNulty, attorney for plaintiff.

It Is Hereby Considered, Adjudged and decreed, that the plaintiff S. J. Simonson, is the owner in fee simple, absolute of the following described land situated in Roberts County, South Dakota, to-wit: the east half (E ½) of the northwest quarter (N. W. ¼), and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼), and the northwest quarter (N. W. ¼) of the southeast quarter (S. E. ¼) of section thirty-two (32) in township one hundred and twenty-five (125), north of range fifty (50) west of the Fifth Principal Meridian; and that defendant Otto Monson, has no estate or interest whatever in or to said above described land and premises, or any part thereof, and that the title of plaintiff to said above described premises is good and valid.

It Is Further Decreed, that the defendant Otto Monson,
67 be and he hereby is forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiff, and that the title in and to the above described premises be and the same hereby is quieted in plaintiff forever.

It Is Further Considered, that the plaintiff S. J. Simonson, have and recover from the defendant Otto Monson, his costs and disbursements, taxed and allowed at thirty-seven dollars and sixty cents ($37.60).

Dated March 26th, 1906.

By the Court:

J. H. McCOY, *Judge.*

Attest:

L. WM. FOSS, *Clerk,*

By AIMEE MacDONALD, *Deputy.* [SEAL.]

Which judgment was duly entered and filed in the office of the clerk of said Court on April 5, 1906. To which judgment and all thereof, defendant at the time duly excepted, and such exception

was allowed. Upon motion of defendant the Court made an order staying all proceedings, except entry of judgment, and extending the time in which defendant might prepare and serve notice of intention to move for a new trial and statement of the case containing exceptions, and affidavits to be used on motion for a new trial, until June 30, 1906.

On June 30, 1906, the defendant duly served upon plaintiff's attorney the following

68 *Notice of Intention to Move for New Trial.*

To the above named plaintiff and to Frank McNulty, attorney for plaintiff:

Please take notice that the defendant Otto Monson, in the above entitled action, intends to move said Court to vacate and set aside the findings made and the judgment rendered and entered herein in favor of plaintiff and against defendant and to grant a new trial of said cause on the following grounds, to-wit:

1. Accident and surprise which ordinary prudence could not have guarded against.

2. Newly discovered evidence material to the defendant which he could not, with reasonable diligence, have discovered and produced at the trial.

3. Insufficiency of the evidence to justify and support the findings and judgment of the Court herein.

4. Error in law occurring at the trial and excepted to by the defendant.

Said motion will be made upon a statement of the case containing exceptions to be hereafter allowed and settled by the Court, and on all the records and files in said action and upon affidavits which are herewith served upon you.

Respectfully,

HOWARD BABCOCK
CHARLES L. CALDWELL,
Attorneys for Defendant.

69 *Specifications of Error.*

Attached to said notice of intention to move for a new trial and the foregoing statement of the case, served on plaintiff's attorney, were specifications of error which were identical with the assignments of error numbered from one to thirty-three, inclusive, which are attached to and made a part of this abstract.

Order Settling Case.

Defendant's proposed statement of the case and specifications of error were duly presented to the court to be settled, and the court thereafter on July 30, 1906, made the following

Order.

The foregoing statement of case containing exceptions, and the whole thereof, is hereby settled and allowed, and hereby incorporated in and made a part of the record of this action, and contains the whole of the testimony offered and received in evidence on the trial of this action, the rulings and judgment of the court and exceptions taken thereto by the defendant.

Dated July 30, 1906.

By the Court.

J. H. McCOY, *Judge.*

Attached to said notice of intention to move for new trial, and served upon plaintiff's attorney at the same time, were the following affidavits upon which said motion for new trial was made:

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Affidavit of Annie Cavender.

STATE OF SOUTH DAKOTA,
County of Roberts, ss:

Annie Cavender, being first duly sworn, says she is more than twenty-one years of age, and resides in the county of Roberts in said state, and is the wife of John Cavender, of said county; that she and her husband camped at an Indian camp at Sisseton Agency, in said county and state, on the 2nd, 3rd and 4th days of July, 1905; that a Fourth of July celebration was held at Sisseton Agency among the Indians at that time, and that they were encamped there with other Indians for the purpose of taking part in said celebration, and that her husband, John Cavender, was a special police at said Indian camp during said celebration. That she is well acquainted with William Quinn and his son, Samuel Quinn, and with William Quinn's brother, Henry Quinn, of St. Paul, Minnesota. That Samuel Quinn, with his wife, was encamped in the same camp about five or six tents away from the tent of affiant and her husband, and Henry Quinn stayed with Samuel Quinn, and William Quinn stayed with Samuel Quinn a portion of the time, and during part of the time William Quinn's wife was there, and then they had a tent of their own. Affiant distinctly recollects that Henry Quinn and William Quinn were around said camp during the greater part of Sunday, and were there Sunday evening,

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July 2nd, and stayed all night in camp, and were there early Monday morning and all day Monday, July 3rd, until towards evening, at which time affiant's husband, John Cavender, with said Henry Quinn and William Quinn, drove to Peever, South Dakota, from which place they returned the same evening and were encamped the rest of the evening and stayed in camp that night, and were there all day July 4th, 1905. Affiant states positively that neither said William Quinn nor said Henry Quinn came to Sisseton on July 3, 1905, or July 4, 1905, but that both of them were at

Sisseton Agency during said two days, except the short time in the evening of July 3rd, when they drove to Peever with her husband.

Affiant further says that, owing to the fact that she is well and personally acquainted with all of said persons, and on account of the Fourth of July celebration occurring at that time, she has a distinct and positive recollection of the matters before stated.

ANNIE CAVENDER.

Subscribed and sworn to before me this 7th day of June, 1906.

[SEAL.] NORA FREEMAN.

Notary Public, Roberts County, S. D.

72 *Affidavit of John Cavender.*

STATE OF SOUTH DAKOTA,
County of Roberts, ss:

John Cavender, being first duly sworn, says that he lives at Big Coulee, in Roberts county, South Dakota, and is personally acquainted with William Quinn and Henry Quinn, brothers. That affiant was at the celebration which occurred at Sisseton Agency on July 4th, and two days previous to that, in the year 1905, and that early in the morning and during the day of Monday, July 3rd, he remembers distinctly seeing both Henry Quinn and William Quinn at the tent of Samuel Quinn, in the Indian camp near said Sisseton Agency, and at other places around the camp all day; and that towards evening of said July 3, affiant, with said Henry Quinn and William Quinn, started for Peever and drove directly to Peever where they procured some liquor and drank some liquor and then drove back to the camp at Sisseton Agency the same evening. That they did not any of them go to Sisseton, and that said Henry Quinn and William Quinn were at said camp at Sisseton Agency all of said July 3, except when they went to Peever, as before stated.

Affiant further says that he was acting as a sort of special police at the Indian celebration held at that time at Sisseton Agency, and that he has a distinct personal recollection of the facts before stated, and remembers of seeing the said Henry Quinn and
73 William Quinn there as stated, and also on the following day, July 4th.

JOHN CAVENDER.

Subscribed and sworn to before me this 5th day of June, 1906.

[SEAL.] HOWARD BABCOCK.

Notary Public, Roberts County, S. D.

Affidavit of Samuel Quinn.

STATE OF SOUTH DAKOTA,
County of Roberts, ss:

Samuel Quinn, being first duly sworn, says he resides near Peever, in Roberts county, South Dakota, is about 33 years of age, and is a

son of William Quinn, of said county and is a nephew of Henry Quinn, of St. Paul, Minnesota.

Affiant further says that on Saturday, the 1st day of July, 1905, he went to Sisseton Agency and encamped in his tent at the Indian camp near the agency, where a Fourth of July celebration was to be held among the Indians. That he was accompanied by his wife, Julia Quinn. That affiant's father, William Quinn, had been visiting affiant and his wife, at their home near Peever a few days before that, and started for the encampment at Sisseton Agency ahead of affiant and his wife on that Saturday, and was at the camp when affiant reached there. That said William Quinn stayed with affiant and his wife in their tent that Saturday night, and was around
74 the camp all day Sunday and Monday following. That on Sunday, July 2, affiant's uncle, Henry Quinn, came to affiant's tent and camped with them that Sunday night, and was there at breakfast, and stayed around the camp until towards evening of Monday, July 3rd. That neither said Henry Quinn nor said William Quinn left the camp until towards evening, July 3rd, 1905, when they both went away with John Cavender, who all said they were going to Peever, and that they came back from Peever the same evening, and affiant thinks they all did go to Peever, and nowhere else. That when said Henry Quinn and William Quinn and John Cavender returned that evening affiant thought that they had been drinking. That said Henry Quinn and William Quinn stayed around the camp and with affiant and his family the rest of the evening, and that night Henry Quinn slept with affiant in his tent and affiant's father, William Quinn, went to his own camp, his wife having come to the camp with their tent. That said William Quinn and Henry Quinn were around the camp and at the celebration all day Tuesday, July 4th, and the only time either of them left the camp was towards evening, July 3rd, when they both went to Peever with John Cavender.

Affiant further says that, owing to the fact that Tuesday was July 4th, and that the Sunday previous was July 2, and that he went there on the Saturday previous, he remembers very distinctly about all the details of the matters hereinbefore stated, and that his
75 recollection of the matter stated is clear and positive.

SAMUEL QUINN.

Subscribed and sworn to before me this 5th day of June, 1906.

[SEAL.] HOWARD BABCOCK,
Notary Public, Roberts County, S. D.

Affidavit of Julia Quinn.

STATE OF SOUTH DAKOTA,
County of Roberts, ss:

Julia Quinn, being first duly sworn, says she is the wife of Samuel Quinn, and that she went with him to Sisseton Agency on July 1st, 1905, and she and her husband camped in their tent in the Indian

camp where the celebration took place at Sisseton Agency from that time until July 5th. That she distinctly remembers that Henry Quinn, an uncle of her husband, and William Quinn, her husband's father, were both at their camp on Sunday evening, July 2, and in the morning of July 3, and that they stayed around camp all day until towards evening, when they went with John Cavender to Peever, from which place they returned the same night, and that said Henry and William Quinn then remained in camp until the celebration was over, and the only time they were absent was
76 on said trip to Peever on the evening of July 3rd.

JULIA QUINN.

Subscribed and sworn to before me this 5th day of June, 1906.

[SEAL.] HOWARD BABCOCK,
Notary Public, Roberts County, S. D.

Affidavit of Otto Monson.

STATE OF MINNESOTA,
County of Ramsey, ss:

Otto Monson, being first duly sworn, deposes and says, that he is the defendant in the above entitled action; that he is more than twenty-one years of age, and that he resides in the city of St. Paul, said county and state; that on the 7th day of July, 1905, affiant left said city of St. Paul to go to the Sisseton Indian Agency, in the vicinity of Sisseton, in the state of South Dakota; that he arrived at said Indian agency at or about two o'clock in the afternoon of the 8th day of July, 1905, and shortly thereafter he met Henry A. Quinn; that said Henry A. Quinn referred to is the identical person who testified as a witness at the trial of the above entitled action, which was held at Sisseton, South Dakota, on the 23rd day of March, 1906; and is also the identical person who is the grantor in, and who delivered a certain deed to affiant on the 10th day of
77 July, 1905, which said deed was introduced in evidence at said trial as "Exhibit 5." That at or about 2:30 o'clock in the afternoon of said 8th day of July, 1905, affiant, accompanied by said Henry A. Quinn, drove with horses and a carriage from said Indian agency to the Central hotel, in the village of Brown's Valley, in the county of Traverse and state of Minnesota, at which last named place they arrived in time for supper on the evening of said last named day; that affiant and said Henry A. Quinn registered at said Central hotel, and they remained there as guests all of the night of July 8, 1905, all of July 9, 1905, and until July 10, 1905; and that during all of the interval of time from the evening of July 8, 1905, to the morning of July 10, 1905, affiant and said Henry A. Quinn were together at said village of Brown's Valley.

And further affiant saith not.

OTTO MONSON.

Subscribed and sworn to before me this 28th day of June, A. D. 1906.

[NOTARIAL SEAL.] C. L. CALDWELL.
Notary Public, Ramsey County, Minn.

My commission expires Aug. 28th, 1906.

78 *Affidavit of Howard Babcock.*

STATE OF SOUTH DAKOTA,
County of Roberts, ss:

Howard Babcock, being first duly sworn, says he is attorney for the defendant in the above entitled action. That at the trial of said action Henry A. Quinn testified that he executed a certain deed, "Exhibit 3," in said case and acknowledged the same before Frank McNulty, a notary public, at Sisseton on July 3, 1905. William Quinn also testified that he was present and saw Henry A. Quinn acknowledge said deed and deliver the same to plaintiff. That said deed was dated May 30, 1905, and that the date of the acknowledgment had been altered and changed after the execution of the deed, as appeared from the fact that the first date written in the acknowledgment had been erased or written over and the date "3rd" had been written in subsequently, as appeared by the fresh appearance of the ink at the time of the trial. Affiant further says, that since the trial of said cause he has talked with sundry persons, namely: Annie Cavender, Samuel Quinn, Julia Quinn and John Cavender, who each state to affiant that both Henry A. Quinn and William Quinn were, on the 3rd day of July, 1905, at Sisseton Agency, about nine miles distant from Sisseton, all day and until nearly night, when they went to Peever, in company with John Cavender, from
79 which place they returned to Sisseton Agency the same evening, and that neither said Henry A. Quinn nor said William Quinn were in Sisseton on said 3rd day of July, 1905. Affiant further says, that the date of the execution and delivery of said deed is material, for the reason that said deed was never recorded, and may have been executed long after the execution and delivery of the deed to defendant, on July 10, 1905. That said Samuel Quinn, Julia Quinn, Annie Cavender and John Cavender, have each made an affidavit to the facts before stated regarding the whereabouts of Henry A. Quinn and William Quinn on July 3, 1905, and stated that they would appear in court and testify to the facts contained in their affidavit if they were subpenaed to attend.

Affiant further says, that neither defendant or his attorneys had any notice whatever prior to the trial of said action that said plaintiff claimed the land in controversy under the deed, "Exhibit 3," before referred to, or under any other deed, except one executed on or about May 31, 1905, and filed in the office of the Register of Deeds of Roberts county on or about June 2, 1905, and that said unrecorded deed claimed to have been delivered on July 3, 1905,

was a complete surprise to the defendant, which he could not by any preparation or investigation have foreseen or anticipated, and that he had no opportunity to procure the attendance of the persons before referred to, or any other persons by whom he could
80 show the facts before stated as to the whereabouts of said Quinns on the date said pretended deed was claimed to have been executed. That defendant and his attorneys believe that said deed was fraudulent, and was executed on some date other than July 3, 1905, and that the same was not executed during the time that intervened from the issuing of patent in fee to Henry A. Quinn and the time when Henry A. Quinn sold and conveyed the land in controversy to the defendant.

Affiant further says that, since the trial of said action, in the law office of Frank McNulty, attorney for plaintiff, he was shown two deeds of the land in controversy from Henry A. Quinn to S. J. Simonson, both of which were unrecorded, one of which was "Exhibit 3," in this case before referred to, which was dated May 30, 1905, and purported to be acknowledged July 3, 1905, and another of which described and conveyed the same land, was signed by said Henry A. Quinn, and purported to be acknowledged before Frank McNulty, a notary public, on the 9th day of July, 1905. That the defendant or his attorneys had no notice of the existence of said other pretended deed of July 9, 1905, until after the trial of this action, and was therefore unable to demand its production for inspection of the court. That defendant and his attorneys verily believe that both said deed which was offered in evidence as "Exhibit 3," the acknowledgment of which had been filled in as July 2, later changed to "3rd," 1905, and said other deed, which was not produced
81 in court, the acknowledgment of which purported to be taken on July 9, 1905, were both fraudulent, spurious, and were manufactured for fraudulent purposes for use on the trial of said cause, for the particular reason, among others, that neither of said deeds had been recorded at the time of the trial of said action, and that the dates of the acknowledgement of said first mentioned deed was originally July 2, which fell on Sunday, and of said last mentioned deed was July 9, 1905, which fell on Sunday, and for the further reason that Henry A. Quinn was in the company of defendant, outside of the state of South Dakota, all day on said July 9, 1905.

That defendant and affiant, his counsel, believe that a conspiracy existed between Henry A. Quinn and the plaintiff, and the plaintiff's agents, assistants and associates to defraud the defendant by manufacturing numerous fraudulent deeds, which were fraudulently and incorrectly dated, for the fraudulent purpose, and with the fraudulent intent, of having said Henry A. Quinn sell and convey said land to defendant and procure money from the defendant therefor, and thereafter defeat the conveyance of said land to said defendant by means of said fraudulent and spurious deeds to be used in this action.

That if a new trial of this action is given by the court, affiant verily believes that the defendant will be able to procure the attendance and

testimony of John Cavender and Annie Cavender, and Samuel Quinn and Julia Quinn, and thereby show that the deed, "Exhibit 3," under which plaintiff claims title, was not executed,
82 acknowledged or delivered on July 3, 1905, but that the same was fraudulent, *sup*rious, and manufactured for the purpose of this action, along with divers other like fraudulent and *sup*rious deeds, and that the same was not executed or delivered after final patent in fee issued to said Henry A. Quinn, and prior to the purchase of the land in controversy by defendant, and defendant will also be able to demand and procure the production in court of the other false, spurious and fraudulent deeds made by Henry A. Quinn to the plaintiff.

HOWARD BABCOCK.

Subscribed and sworn to before me this 30th day of June, 1906.

[SEAL.] NORA FREEMAN,
Notary Public, Roberts County, S. D.

On August 3, 1906, by stipulation of the parties, said motion for a new trial was brought on for hearing before the court, defendant appearing by Howard Babcock, his attorney, in support of said motion, and plaintiff appearing by Frank McNulty, his attorney, in opposition thereto, and the court, after duly considering the same, made the following

83 *Order Denying Motion for a New Trial.*

The above entitled matter coming on to be heard at the chambers of the judge of this court, at the city of Aberdeen, on the 3d day of August, 1906, on the defendant's motion to vacate and set aside the Findings and Judgment of the court heretofore rendered in said cause in favor of the plaintiff and against the defendant, and to grant a new trial thereof, the plaintiff appeared by his attorney, Frank McNulty, and the defendant by his attorney, Howard Babcock, and the court having considered the files and records in said case, and the affidavits offered and received in evidence on the part of the plaintiff and defendant herein, and after listening to the arguments of counsel, and being satisfied in the premises, it is hereby

Ordered, that the motion of the defendant to vacate and set aside the Findings and Judgment, and to grant a new trial of said cause, be and the same hereby is in all things overruled and denied.

By the Court:

J. H. McCOY, *Judge.*

Attest:

L. W. FOSS, *Clerk.*
By AIMEE L. MacDONALD, *Deputy.* [SEAL.]

Which said order was thereafter, on August 6, 1906, duly served upon defendant's attorneys and filed, entered and recorded in the office of the clerk of said court.

84 *Appeal to Supreme Court.*

Thereafter, and on the 31st day of August, 1906, the defendant and appellant herein duly perfected an appeal to the supreme court of South Dakota from said judgment and said order denying motion for a new trial, by serving upon plaintiff's attorney and upon the clerk of the circuit court of Roberts county, South Dakota, a notice of appeal setting forth that such appeal was taken from the whole of said judgment and from the whole of said order overruling and denying defendant's motion for a new trial, and by serving upon plaintiff's attorney and filing with the clerk of said court an undertaking for costs and a supersedeas bond in this action, as required by law, which notice of appeal and undertaking on appeal were duly filed and entered in the office of the clerk of said court on the same day.

Assignments of Error.

And the appellant herein says there is manifest error on the face of the record in this:

1. The court erred in overruling defendant's objection to the question asked the witness, William Quinn, "On the 3rd day of July, 1905, in my office, you say Henry A. Quinn handed or delivered this deed to S. J. Simonson," and in permitting witness to answer said question.

2. The court erred in overruling defendant's objection
85 to the admission of "Exhibit 3" in evidence, and in admitting said "Exhibit 3" in evidence in this case.

3. The court erred in overruling defendant's objection to the admission of "Exhibit 2" in evidence, and in admitting "Exhibit 2" in evidence.

4. The court erred in overruling defendant's objection to the question asked the witness S. J. Simonson, "Q. Do you remember when you took possession of it"? and in permitting said witness to answer said question, and erred in permitting said witness to answer the two questions following over defendant's objection, testifying that he took possession of the land in controversy on May 31, 1905, which was prior to the issue of the patent in fee from the United States, "Exhibit 1."

5. The court erred in overruling defendant's objection to the question asked the witness Simonson, "Q. I will show you 'Exhibit 3,' and ask you when you received that instrument from Henry A. Quinn, if you ever received it"? and in permitting said witness to answer said question.

6. The court erred in overruling and denying defendant's objection to the question asked the witness Simonson, "Q. Have you been in possession of it ever since June, 1905"? and in permitting witness to answer said question.

7. The court erred in sustaining plaintiff's objection to the question asked the witness Simonson on cross-examination, "Q. Then,

so far as the Indian office was concerned, you were simply a
86 trespasser on the land, without permission of the Indian office or the Secretary of the Interior"? and in refusing to permit witness to answer said question.

8. The court erred in overruling defendant's objection to the question asked witness, Henry A. Quinn, "Q. I will ask you if you ever had that instrument in your possession"? and in permitting witness to answer said question.

9. The court erred in overruling defendant's objection to the question asked William Quinn, "To whom, if anybody, did you ever give it to"? and in permitting witness to answer said question.

10. The court erred in overruling and denying defendant's objection to the testimony of the witness Frank McNulty, and in denying defendant's motion to strike out the testimony of said witness.

11. The court erred in overruling and denying defendant's objection to the question asked witness W. B. Robb, "Q. When did you commence plowing there, if you remember"? and in permitting witness to answer said question.

12. The court erred in denying defendant's motion to strike out the testimony of the witness W. B. Robb.

13. The court erred in sustaining plaintiff's objection to the question asked Otto Monson, "Q. Where was that talk and negotiation"? and in refusing to permit witness to answer said question.

14. The court erred in sustaining plaintiff's objection to the question asked the witness Otto Monson, "Q. Have you paid any
87 part of that (the purchase price) since that time"? and in permitting witness to answer said question.

15. The court erred in sustaining plaintiff's objection to the following question asked defendant Monson on the witness stand, "I will ask you whether you had any knowledge or notice that any one was in possession or claimed to be in possession of said land in any way whatever at the time you took that deed?" (referring to deed from Quinn to Monson, "Exhibit 5"), and in refusing to permit witness to answer said question.

16. The court erred in sustaining plaintiff's objection to the question asked the witness A. W. Mitton, "Q. You may examine 'Exhibit 5' and state whether you ever signed that instrument—ever saw that instrument before"? and in not permitting witness to answer said question.

17. The court erred in sustaining plaintiff's objection to the question asked the same witness, "Q. I will ask whether or not you saw Mr. Quinn execute that instrument"? and in not permitting said witness to answer said question.

18. The court erred in sustaining plaintiff's objection to the question asked witness Mitton, "Q. What did they do there that day"?

19. The court erred in sustaining plaintiff's objection to the question asked witness Mitton, "Q. I will ask you whether or not, before taking his acknowledgement, you read over to Mr. Henry A. Quinn the entire contents of that deed, the exhibit you now hold in your hand"?

88 20. The court erred in granting plaintiff's motion to make findings in favor of plaintiff and enter a judgment thereon in favor of plaintiff.

21. The court erred in finding as a matter of fact that at the commencement of this action the plaintiff was and still is the owner, and entitled to the possession of the lands described in the complaint and findings herein.

22. The court erred in finding as a matter of fact that the plaintiff was in the possession of said lands at the time of the commencement of this action, and has been in the actual, continuous and notorious, open and adverse possession of said premises, and every part thereof, from July 3, 1905, until July 10, 1905, and on July 10, 1905, and ever since.

23. The court erred in finding as a matter of fact that on July 3, 1905, Henry A. Quinn, for a valuable consideration, made, executed and delivered a warranty deed to plaintiff, S. J. Simonson, conveying unto the said S. J. Simonson the lands described in finding of fact No. 3 herein, and in finding that said warranty deed was duly executed and delivered by said Henry A. Quinn on July 3, 1905.

24. The court erred in finding as a matter of fact that the defendant Otto Monson had notice of the rights of said S. J. Simonson in and to said lands at the time he procured a quitclaim deed of said premises from Henry A. Quinn on July 10, 1905.

89 25. The court erred in finding as a matter of fact that the defendant, Otto Monson, has no estate, right, title or interest whatever in said lands and premises, or any part thereof.

26. The court erred in finding as a matter of fact that the allegations of plaintiff's complaint are in all things true.

27. The court erred in finding as a matter of fact that the allegations of defendant's answer are not true.

28. The court erred in finding as a matter of fact that at all times involved in this action the defendant, Otto Monson, had notice and knowledge of the rights of plaintiff in and to the above described premises, and each and every part thereof.

29. The court erred in finding as a conclusion of law that at the commencement of this action the plaintiff was and still is the owner of, and entitled to the possession of, the premises described in the findings and judgment herein.

30. The court erred in finding as a conclusion of law that the defendant has not and never had any estate, right, title or interest whatever in said land and premises, or any part thereof.

31. The court erred in its conclusion of law that the title of plaintiff to said premises is good and valid.

32. The court erred in its conclusion of law that the plaintiff is entitled to a decree quieting title in and to the above described premises in said S. J. Simonson, and enjoining and debarring the

90 defendant forever from asserting any claim whatever in or to said lands and premises adverse to the plaintiff.

33. The court erred in rendering judgment in said action in favor of plaintiff and against the defendant.

34. That the evidence is insufficient to justify and support the findings made and the decision and judgment of the court in this:

a. That no competent evidence was offered and received on the trial proving or tending to prove that the plaintiff, Simonson, was in possession of the land in controversy at any time on or after the 29th day of June, 1905, and up to and until the 10th day of July, 1905, or that said Simonson took possession of said land after the issue of the patent from the United States to Henry A. Quinn, and prior to the time defendant received and recorded his deed from Quinn. The only evidence as to possession showed that long prior to the issue of final patent to Henry A. Quinn, and while the title was in the United States, the plaintiff, Simonson, employed one Robb to plow upon the land, at which time any possession was wrongful and nugatory.

b. That no competent evidence was offered or received on the trial proving or tending to prove that Henry A. Quinn executed and delivered to the plaintiff, S. J. Simonson, a deed of the land in controversy on the 3rd day of July, 1905, or that the warranty deed,
91 "Exhibit 3," offered in evidence conveying the lands in controversy was executed and delivered by Henry A. Quinn on July 3, 1905, the deed itself showing it to be made on May 30, 1905, long prior to the issue of final patent from the United States to Henry A. Quinn, and the acknowledgment on said instrument appeared to have been changed and altered since its execution. It also appears from the affidavits of Samuel Quinn and his wife, and John Cavender and his wife, that Henry A. Quinn was not in Sisseton, where the deed was purported to be executed, at all on July 3, 1905. Plaintiff's evidence ("Exhibit 2") showed that on May 31, 1905, plaintiff, Simonson, took a deed from Henry A. Quinn of the land in controversy, which was recorded in the office of the Register of Deeds of Roberts county on June 2, 1905, and which was offered in evidence in this action as plaintiff's "Exhibit 2." It was under this deed that plaintiff attempted to take possession of the land, and plaintiff having recorded this deed and offered it in evidence in this case, the only notice which defendant could be charged with is that arising from the deed, "Exhibit 2."

c. No competent evidence was offered or received on the trial proving or tending to prove that the defendant, Otto Monson, had any notice of the rights of the plaintiff, S. J. Simonson, in and to the above described land at the time he procured and recorded his deed of said premises from Henry A. Quinn, on July 10, 1905, or at any other time involved in this action. Plaintiff had taken the
92 deed, "Exhibit 2," of said premises from Henry A. Quinn on May 31, 1905, and recorded the same in the office of the Register of Deeds of Roberts county on June 2, 1905, which is the only deed of which Otto Monson had any notice, and which deed being executed long prior to final patent from the United States, gave Simonson no right to the land in controversy, and did not constitute notice of any right.

d. That no competent evidence was offered or received on the trial proving and sufficient to support the finding of the court that at the commencement of this action the plaintiff, S. J. Simonson, was the

owner and entitled to the possession of the lands in controversy or that plaintiff, S. J. Simonson, was in possession of said lands at any time prior to the commencement of this action.

e. That no evidence was offered or received on the trial sufficient to support the finding of the court that the defendant has no estate, right, title or interest whatever in said lands and premises described in the Findings and Decree herein.

f. That no competent evidence was offered or received on the trial sufficient to justify and support the finding of the court that the allegations of plaintiff's complaint are in all things true.

g. That no competent evidence was offered or received on the trial sufficient to justify and support the finding of the court that the allegations of defendant's answer are not true.

35. That the judgment and decision of the court herein is
93 against law for the reason that it appears from all the evidence that plaintiff is not entitled to the judgment rendered and entered against defendant herein.

36. That the court erred in overruling and denying defendant's motion for a new trial herein.

Very respectfully,

CHESTER L. CALDWELL and
HOWARD BABCOCK,
Attorneys for Appellant.

94 "C" a—2502.

In the Supreme Court, State of South Dakota.

E. J. SIMONSON, Respondent,
vs.
OTTO MONSON, Appellant.

Appeal from the Circuit Court of Roberts Co.

Opinion Filed July 8, 1908.

95 Chester L. Caldwell and Howard Babcock, Attorneys for Defendant and Appellant.
Frank McNulty, Attorney for Plaintiff and Respondent.

CORSON, *J.*:

This is an action to determine conflicting claims to a tract of land in Roberts County. The complaint is in the usual form and alleges that the plaintiff is the owner in fee and in possession of the premises. The answer is a general denial; admits plaintiff's possession; and alleges ownership as an affirmative defense and ownership as a counterclaim. Both parties claim title under Henry A. Quinn an Indian allottee under the act of Congress approv. 8 Feb. 8, 1887, generally known as the Indian Allotment act. By act of Congress approved March 3, 1905, the Secretary of the Interior was authorized to issue a patent in fee to said Quinn and said final patent was issued

June 29, 1905. Prior to the last date and on the 31st day of May, 1905, plaintiff obtained from said Henry A. Quinn a warranty deed dated and acknowledged May 31, 1905, which he had recorded in the office of the Register of Deeds of Roberts County on the 2nd day of June, 1905.

On the trial the plaintiff introduced in evidence the patent from the United States to said Quinn which was admitted without objection. He then offered in evidence the deed executed May 31, 1905, by Henry A. Quinn to himself bearing date of May 31, 1905, and recorded June 2nd, 1905. This deed was objected to on the ground that the deed was incompetent and irrelevant for any purpose and as being absolutely void under the statutes of the United States being apparently executed, acknowledged and recorded long prior to the issuance of the patent to the said Henry A. Quinn. This objection was overruled and the defendant excepted.

The plaintiff also introduced in evidence the deed executed by the said Quinn to the plaintiff purporting to be executed the 30th day of May, 1905, and acknowledged on the 3rd day of July,
96 1905, but not recorded. The admission of this deed in evidence was also objected to on the ground that it appears to have been executed on May 30th, 1905, long prior to the issuance of the patent in fee to said Quinn and on the further ground that said deed had not been recorded. This objection was overruled, the deed admitted and the defendant duly excepted.

The defendant in support of his title offered in evidence a deed purporting to be executed by the said Quinn to himself bearing date of the 10th day of July, 1905, and acknowledged and recorded on the same day for the same premises. The defendant then offered in evidence chapter 149 of Vol. 24 of United States Statutes at Large which was received in evidence over plaintiff's objection. This statute is set out in the abstract and will be subsequently referred to. The defendant then offered in evidence the act of March 3, 1905, which was admitted without objection.

It is contended by the defendant and appellant that the deed purporting to be executed on May 31st by said Quinn to the plaintiff and recorded on June 2nd was void for the reason that it was executed prior to the issuance of the patent; that the second deed purported to be executed by Quinn to the plaintiff on May 30th and acknowledged on July 3rd not being recorded was ineffectual as against the appellant who had no actual notice of the execution of said deed and no constructive notice of the same and that therefore the appellant acquired a good title to the said premises as against the plaintiff by his deed of July 10th, 1905.

The plaintiff and respondent contends, (1) that the deed executed May 31st and recorded June 2nd was a valid deed as it was executed subsequently to the act of March 3rd, 1905, notwithstanding it was executed prior to the issuance of the patent; that if said deed executed May 31st, and recorded June 2nd was not valid and did not convey the premises then the deed bearing date of May
97 30th and acknowledged July 3rd and delivered to the plaintiff by said Quinn on that day being a full warranty deed

was good as against the appellant's deed which was simply a quit claim deed; that the possession of the plaintiff on the premesies in controversy constituted constructive notice to the defendant of respondent's ownership of the property and that such deed was therefore good and valid as against the defendant's quit claim deed and that the court was therefore right in making its finding and entering judgment in favor of the plaintiff.

The act approved Feb. 8, 1887, known as the Allotment Act provides among other things that where by treaty or stipulation the Indians occupy a reservation, the same may be surveyed and allotted in severalty to the Indians occupying the same. By section 5 of the act it is provided "that upon the approval of the allotment provided for in this act by the Secretary of the Interior, he shall cause patents to issue in the name of the allottees which patent shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for a period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that at the expiration of such period the United States will convey the same by patent to said Indian or his heirs as aforesaid in fee discharged of such trust and free of all charge or encumbrance whatsoever. Provided that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the land set apart and allotted as herein provided or any contract made touching the same, before the expiration of the time above mentioned such conveyance or contract shall be absolutely null and void."

98 By the act of March 3rd, 1905, it is provided, "That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn" for the premises in controversy in this action.

We are of the opinion that the deed executed by Quinn to the respondent bearing date of May 31st and recorded June 2nd was a valid deed notwithstanding the inhibition contained in the act of 1887, before quoted, the same having been executed after the act of March 3, 1905, which in effect repealed by implication the clause in the act of 1887 making any conveyance or contract before the expiration of the twenty-five years absolutely "null and void" so far as the premises in controversy are involved and that the court properly overruled the defendant's objection to its admission in evidence.

Subdivision 1 of Section 947 of our Civiy Code provides, "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors." The deed executed by said Quinn to the plaintiff bearing date of May 31st, 1905, acknowledged on the same day and recorded on June 2nd is a full warranty deed purporting to grant the property in fee simple to the plaintiff and therefore by it the title acquired by Quinn under his patent issued on June 29th passed upon the issuance of the patent by operation of law to the plaintiff under and by virtue of the provisions of the statute above quoted.

The act of March 3, 1905, had the effect of leaving Quinn free to convey the premises and hence his conveyance though made prior to the issuance of the patent had the effect of tran-ferring
99 to the plaintiff the title acquired by him under his patent.

Plaintiff's warranty deed of May 31st having been duly acknowledged and recorded imparted constructive notice to the defendant of plaintiff's right to the property and that any title that might be acquired by Quinn under his patent would pass by operation of law to the plaintiff. Burnardy v. Mortgage Company, 17 S. D. 637, 98 N. W. 166; Same vs. Same, 105 N. W. 737; Zerfing vs. Seeling, 12 S. D. 25; State vs. Kemmerer, 14 S. D. 169.

The contention of the appellant that the court made no finding as to the deed of May 31st and recorded June 2nd, 1905, and therefore that deed is not properly before the court is untenable as the court finds that the plaintiff is the owner of the property and entitled to its possession and this finding necessarily includes any deed introduced in and admitted in evidence conveying to the plaintiff the title.

The views herein expressed renders unnecessary the consideration or discussion of the nature and character of the plaintiff's possession and the nature and character of the deed from Quinn to the defendant and also renders unnecessary any consideration or discussion of the rulings of the court on the motion for a new trial based upon the grounds of newly discovered evidence and the other questions presented by the record in this case.

The judgment of the circuit court and order denying a new trial are affirmed.

100 File No. 2502.

In the Supreme Court, State of South Dakota, April Term, A. D. 1910.

Present: Dick Haney, Presiding Judge; Howard S. Fuller, and Dighton Corson, Judges of said Court and the Officers thereof.

E. J. SIMONSON, Plaintiff and Respondent,
vs.
OTTO MONSON, Defendant and Appellant.

This action coming on to be heard at the April, A. D. 1907, Term of this Court, at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the cases and without oral argument, and the Court having advised thereon and filed its decision in writing.

It is considered, Ordered and Adjudged, That the judgment and order of the Circuit Court, within and for Roberts County, appealed from herein, be and the same is hereby affirmed.

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, That Respondent have and recover of the Appellant costs and disbursements on this appeal, expended, taxed and allowed at Fifty-six and no 100 Dollars.

By the Court,

HOWARD S. FULLER,
Acting Presiding Judge.

Attest:
[SEAL.] FRANK CRANE, *Clerk.*
By —— ——,
Deputy Clerk.

101 In Supreme Court, State of South Dakota.

S. J. SIMONSON, Respondent,
vs.
OTTO MONSON, Appellant.

Petition.

The petition of Otto Monson, Defendant and Appellant in the above entitled cause respectfully shows to your Honor:

I.

That the said cause is an action commenced by the Respondent above named, against your Petitioner to determine title to the following described premises situated in the County of Roberts, State of South Dakota, to-wit:

The east half (E. ½) of the northwest quarter and the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼) and the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼) of section thirty-two (32) in township one hundred twenty-five (125) North of Range fifty (50) west of the fifth principal meridian.

That said cause was commenced in the Circuit Court of Roberts County, South Dakota and judgment rendered against your petitioner, and was thereafter appealed to the Supreme Court of the State of South Dakota, which said last named Court rendered a final judgment against your Petitioner on the 8th day of July, 1908.

III.

That said Plaintiff and Respondent, above named, claims title under a quit-claim deed obtained from one Henry A. Quinn which Respondent alleges vests title in him to the above described premises. That said Henry A. Quinn was an Indian of the Sisseton and Wahpeton tribe or band, and during all the time herein mentioned living on one of the reservations.

102 IV.

That on February 8th, 1887, the Congress of the United States passed an act entitled:

"An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend protection of the laws of the United States and the territories over the Indians and for other purposes." Approved February 8, 1887 (24 Stats. 388).

That by the fifth section of the said act of Congress it is provided:

"That upon the approval of the allotments provided for in this act by the Sec'y of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for and the sole use and benefit of the Indian to whom such allottment shall have been made, or in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever: provided, that the President of the United States may, in any case, in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned such conveyance or contract shall be absolutely null and void."

That following said allotment the Government of the United States duly issued to said Henry A. Quinn a patent covering the above described premises, which said patent was subject to and contained the limitations provided for in said act of Congress of February 8th, 1887.

V.

That the deed upon which said plaintiff and respondent rests his title was obtained from said Henry A. Quinn long before the expiration of the time fixed in said act of Congress prohibiting a conveyance of said land by said Henry A. Quinn, and your petitioner claims said deed was null and void under said Act of Congress.

VI.

103 That on the third day of March, 1905, an Act was passed by the Congress of the United States entitled:

"An act making appropriations for the concurrent and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June 30th, 1906, and for other purposes."

That the said act, among other things, provided:

"That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred twenty-five, north of Range fifty, west of the fifth principal meridian, South Dakota."

That under and in compliance with the provisions of said act of Congress, a fee simple patent, to the land herein described, was

on the 29th day of June, 1905 (and not before that date) issued to said Henry A. Quinn.

VII.

That after the passage of said Act of March 3rd, 1905, and on the 10th day of July, 1905, the said Henry A. Quinn for a valuable consideration, made, executed and delivered to your petitioner a good and sufficient deed conveying to your petitioner the above described premises, which said deed was duly recorded on the 10th day of July, 1905.

VIII.

That upon the trial of said action the said Circuit Court of South Dakota held the deed given to said respondent valid and gave judgment against the claims of your Petitioner. That thereafter your Petitioner duly appealed to the Supreme Court of South Dakota and pressed before said Supreme Court the invalidity of said deed given to Respondent, but said last named Court rendered a final judgment in said cause against the claims of your petitioner and affirming the judgment of the said Circuit Court.

IX.

That said Supreme Court was and is the Tribunal having juris-diction in the State of South Dakota to render final judgments in all actions of the nature of the above entitled action, and the said judgment is the final judgment in said cause in favor of said respondent and against your petitioner.

X.

That the final judgment of the Supreme Court of the State of South Dakota was against each and all of the rights so claimed by your petitioner under the said acts of Congress and against the title of your petitioner to said lands obtained pursuant to the terms of said acts of Congress, all of which will more fully appear by the records in said proceedings now remaining in said Supreme Court.

XI.

That said lands are reasonably worth more than twenty-five hundred dollars ($2500).

Wherefore, for as much as your Petitioner prays that there was manifest error in said decision of said Court against the several claims of your petitioner, as hereinbefore set forth, and in the final judgment in said action, which is to the great damage of your petitioner; your petitioner prays that your Honor will examine the records of said Supreme Court of the State of South Dakota in his behalf and allow your petitioner a writ of error to the end that said judgment and record may be brought before the Supreme Court

of the United States agreeable to the laws of the United States in that behalf enacted.

Dated this 7th day of June, A. D. 1910.

OTTO MONSON.

M. D. MUNN,
CHESTER L. CALDWELL,
Solicitors and Att'ys for Petitioner.

105 STATE OF MINNESOTA,
County of Ramsey, ss:

Otto Monson, being by me sworn on oath states: That he is the Petitioner named in the foregoing Petition; that he has read said Petition and knows the contents thereof and that the same is true to the knowledge of the deponent.

OTTO MONSON.

Subscribed and sworn to before me this 10th day of June, A. D. 1910.

[SEAL.] C. L. CALDWELL,
Notary Public, Ramsey Co., Minn.

My commission expires August 28, 1913.

On Reading the foregoing Petition and upon said Petition and the Record submitted therewith:

It is hereby ordered that the writ of error in said Pejition prayed for, be, and the same is hereby allowed, provided, however, that the said Petitioner give a bond according to law in the sum of Five Hundred Dollars ($500).

CHAS. S. WHITING,
Presiding Judge.

[Endorsed:] Copy. Petition.

106 Supreme Court of the United States.

OTTO MONSON, Plaintiff in Error,
vs.
S. J. SIMONSON, Defendant in Error.

To S. J. Simonson, Defendant in Error:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty (30) days from the date hereof pursuant to a Writ of Error filed in the Clerk's Office in the Supreme Court of the State of South Dakota, wherein Otto Monson is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done in that behalf.

Witness The Honorable Chas. S. Whiting, Presiding Judge of

the Supreme Court of the State of South Dakota this 15th day of June, A. D. 1910.

[SEAL.] CHAS. S. WHITING,
Presiding Judge.

Attest:
FRANK CRANE, *Clerk.*

[Endorsed:] Copy. Citation.

107 Supreme Court of the United States.

OTTO MONSON, Plaintiff in Error,
vs.
S. J. SIMONSON, Defendant in Error.

Know all men by these presents: That we, Otto Monson as Principal and The American Bonding Company of Baltimore as Surety, are held and firmly bound unto S. J. Simonson, in the sum of Five Hundred Dollars ($500) to be paid said S. J. Simonson, for which payment well and truly to be made we bind ourselves, and each of us for our and each of our successors, heirs executors and administrators, jointly and severally by these presents.

Whereas, the above named Otto Monson plaintiff in error seeks to prosecute his Writ of Error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Dakota:

Now therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute his Writ of Error to effect and pay all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void; otherwise, to remain in full force and effect.

OTTO MONSON.
AMERICAN BONDING CO. OF BALTIMORE.
FITZHUGH BURNS, *Vice Pres.*
JAMES T. LAMBIE, *Ass't Sec'y.*

Signed, sealed and delivered in the presence of
M. E. HAWKINS.
E. E. BLASURS.

108 STATE OF MINNESOTA,
County of Ramsey, ss:

Be it known that on the 10th day of June, A. D. 1910 before me personally appeared Otto Monson, whose name is subscribed to the foregoing as Principal, and who being by me duly sworn on oath did for himself depose and say: That he executed said instrument and bond voluntarily and *has* his own free act and deed for the uses and purposes therein stated.

[SEAL.] C. L. CALDWELL,
Notary Public, Ramsey Co., Minn.

My commission expires August 28, 1913.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 10th day of June, A. D. 1910 before me, a notary public within and for said county, personally appeared Fitzhugh Burns and James T. Lambie, to me personally known, who being each be me duly sworn did say that they are respectively the Vice President and Assistant Secretary of the American Bonding Company of Baltimore, the corporation named in the foregoing instrument, and the seal affixed to said instrument, is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by the authority of its Board of Directors and said Fitzhugh Burns and James T. Lambie acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] E. C. B. CASUIS,
Notary Public, Ramsey Co., Minn.

My commission expires Mar-h 20, 1914.

[Endorsed:] Copy. Bond.

109 Supreme Court of the United States.

OTTO MONSON, Plaintiff in Error,
vs.
S. J. SIMONSON, Defendant in Error.

Assignment- of Error.

Now comes the Plaintiff in Error in the above entitled cause and avers and shows that in the records and proceedings in said cause the Supreme Court of the State of South Dakota erred to the grevious injury and wrong of the Plaintiff in Error herein and to the prejudice*d* and against the rights of the Plaintiff in Error in the following particulars, to-wit:

I.

The said Supreme Court of South Dakota erred in holding that the Deed upon which Defendant in Error rests his title to the following described premises:

"The east half of the northwest quarter and the northeast quarter of the southwest quarter, and the northwest quarter of the northeast quarter of Section thirty-two, in township one hundred twenty-five, north of range fifty west, of the fifth princi*ap-* meridian."

Is not null and void under the Act of Congress of February 8, 1887.

II.

The said Supreme Court erred in holding that the Act of Congress of March 3rd, 1905, in effect repealed by implication the clause in the said Act of Congress of February 8th, 1887, and made

valid any conveyance or contract executed and delivered prior to the issuance of a patent by the Government under the said Act of Congress of March 3rd, 1905.

III.

110 The said Supreme Court erred in holding that the Provisions of sub-division Four (4) of Section 947 of the Revised Civil Code of the State of South Dakota in any way made valid the title of said Deed to Defendant in Error.

IV.

The said Supreme Court erred in holding that the Deed of Plaintiff in Error obtained from said Henry A. Quinn after the issuance of the patent to said Henry A. Quinn under the said Act of Congress of March 3rd, 1905, did not vest title to said land in Plaintiff in Error.

V.

The said Supreme Court erred in not reversing the judgment of the Trial Court and in not giving to Plaintiff in Error his rights under the said Acts of Congress, as claimed and set forth in the Records in said cause.

Wherefore, for these and other manifest errors appearing in the Records the said Otto Monson, Plaintiff in Error prays that the judgment of the said Supreme Court of the State of South Dakota be reversed and set aside and held for nought, and that judgment be rendered for the plaintiff in error granting him title to the said property under his said Deed from said Henry A. Quinn under the Acts of Congress; and Plaintiff in Error also prays judgment for his costs herein.

Dated this — day of June, A. D. 1910.

[Endorsed:] Copy. Assignment of Error.

111 In the Supreme Court of the United States.

OTTO MONSON, Plaintiff in Error,
vs.
S. J. SIMONSON, Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the redition of the judgment of a plea which is in the said Supreme Court of the State of South Dakota, before you or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Otto Monson, Defendant and Plaintiff

in Error and S. J. Simonson, Plaintiff and Defendant in Error, wherein was drawn into question the validity of certain Deeds issued pursuant to Acts of Congress; and also was drawn into question the construction and effect of said Acts of Congress of the United States and decision against the claim of Defendant and Plaintiff in Error on a claim under said Acts of Congress, and wherein said Acts of Congress were construed against the claim of Defendant and Plaintiff in Error especially set up and claimed under said Acts of Congress, a manifest error hath happened to the great damage of said Otto Monson, Plaintiff in Error, as by his complaint appears, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to and between the parties aforesaid, do command you, if judgment be therein given, that
112 then, under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this Writ, so that you may have the same at Washington on the 14 day of August next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done:

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25 day of June A. D. 1910.

[Seal Circuit Court of the United States, District of South Dakota. Pierre.]

OLIVER J. PENDER,
Clerk of the United States Circuit Court
for the District of South Dakota.

113 [Endorsed:] Original. Supreme Court of the United States. Otto Monson, Plf. in Error, vs. S. J. Simonson, Def't in Error. Writ of Error. Supreme Court, State of South Dakota. Filed Jul- 7, 1910. Frank Crane, Clerk.

114 STATE OF SOUTH DAKOTA,
In the Supreme Court, ss:

S. J. SIMONSON, Plaintiff and Respondent,
vs.
OTTO MONSON, Defendant and Appellant.

I, Frank Crane, Clerk of the Supreme Court of the State of South Dakota, certify that the within and foregoing papers, to wit: the abstract, opinion of the Supreme Court of the State of South Dakota, judgment of the Supreme Court of the State of South Dakota, petition for writ of error to the United States Supreme Court, writ of error allowed by the Supreme Court of the State of South Dakota, citation, bond on appeal to the United States Supreme Court, and assignment of error in the case of S. J. Simonson vs. Otto Monson,

are true and correct copies of the original papers now on file in the Supreme Court of the State of South Dakota, and that the writ of error issued by the Supreme Court of the United States in the above entitled cause is hereby annexed.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of the Supreme Court, State of South Dakota.

Endorsed on cover: File No. 22,268. South Dakota Supreme Court. Term No. 107. Otto Monson, plaintiff in error, vs. S. J. Simonson. Filed July 20, 1910. File No. 22,268.

15

14

No. ~~107~~

Supreme Court of the United States

OCTOBER TERM, 1912.

OTTO MONSON,

Plaintiff in Error,

vs.

S. J. SIMONSON,

Defendant in Error.

M. D. MUNN,
C. L. CALDWELL,
Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1912.

OTTO MONSON,

Plaintiff in Error,

vs.

S. J. SIMONSON,

Defendant in Error.

Now comes the Plaintiff in Error in the above entitled cause, and respectfully moves that this Court order and direct that an Alias Citation be issued in the above entitled cause, and that the same may be served on the Defendant in Error, subject to such terms and conditions as this Honorable Court may prescribe. This Motion and application is made for the reasons and upon the grounds set forth in the hereto attached affidavit, together with the printed record on file in the office of the Clerk of this Court. In this connection we respectfully call the attention of the Court to the following cases: *Dayton v. Lash*, 94 U. S., page 112; *Richaidson v. Green*, 130 U. S., 104; *Evans v. Bank*, 134 U. S., 330; *Jacobs v. George*, 150 U. S., 415.

Respectfully submitted,

M. D. MUNN,

C. L. CALDWELL,

Counsel for Plaintiff in Error.

Dated this 22d day of Nov., 1912.

Supreme Court of the United States

OCTOBER TERM, 1912.

OTTO MONSON,

Plaintiff in Error,

vs.

S. J. SIMONSON,

Defendant in Error.

STATE OF MINNESOTA, County of Ramsey, ss.

M. D. MUNN, being first duly sworn, on oath says that the above entitled cause comes to this Court on a Writ of Error to the Supreme Court of the State of South Dakota, from a final judgment entered in that Court. That a petition for a Writ of Error was duly presented to the Supreme Court of the State of South Dakota, on the 10th day of June, 1910, which said petition is found on pages 52 to 54, inclusive, of the printed record, on file in this Court. That on the presentation of said petition, the Supreme Court of South Dakota, acting through Charles S. Whiting, Presiding Justice of said Supreme Court, duly allowed the Writ of Error asked for in said Petition, and required that said Petitioner, Plaintiff in Error herein, give a bond according to law, in the sum of Five Hun-

dred (500) Dollars, which said bond was thereafter approved by said Court and filed with the Clerk of the Supreme Court of South Dakota, as provided in said Order. Said bond was duly approved and filed before the Citation hereinafter referred to was issued. That after said petition for Writ of Error and the Order allowing the same, together with said bond required in said Order, had been filed, a citation was duly issued by the Supreme Court of South Dakota, acting through and signed by Charles S. Whiting, Presiding Justice of said Supreme Court, of South Dakota. Said Citation was duly issued on the 15th day of June, 1910, and duly attested and sealed. A certified copy thereof appears on page 54 of the printed record on file in this Court.

That thereupon Plaintiff in Error duly filed Assignments of Error in said cause, with the Clerk of the Supreme Court of South Dakota, and a Writ of Error was duly issued which are found at pages 57 and 58 of the printed record. That pursuant to said Writ, the Clerk of said Supreme Court of South Dakota, duly transmitted said record to this Court. That said original Citation was mailed by the Clerk of the Supreme Court of South Dakota to this affiant, and this affiant to the best of his knowledge and belief, immediately delivered it to one of the clerks employed in affiant's office, with directions that the same be served upon said Defendant in Error, and proof of said service returned to this Court. That such clerk is no longer in the employ of this affiant, and this affiant is not able to locate him, although due effort has been made to do so. There is no record in this affiant's office showing that said Citation was actually served on Defendant in Error, and for that reason this affiant

is unable to state positively that such service was made, although affiant has always supposed that such service had been made, and does not now know that it was not; but this affiant is unable to supply this Court with any positive proof that service of said Citation was made, as required by law.

On October 14th, 1912, before the record had been printed, this affiant wrote the Clerk of this Court, asking whether or not all records in said cause were in his office, as required by law, with proof of service of said Citation, and learned for the first time from said Clerk, that only an authenticated copy of the Citation was on file, and that there was no proof of service attached to the same, and no appearance filed by Defendant in Error. This affiant thereupon began an investigation for the purpose of ascertaining what if any proof there is, of the service of said Citation, but has been unable to obtain any proof that such Citation was served, beyond the supposition this affiant has, based upon the facts above stated.

Affiant further states that said Writ of Error, required said record to be transmitted to this Court, on or before the 14th day of August, 1910, which was done. After said return and during July, 1910, this affiant paid the docket fee to the clerk and filed appearance. That said Citation required the Defendant in Error to be and appear before this Honorable Court on or before the 15th day of August, 1910. That all requirements necessary to the due removal of said cause to this Court, have been fully complied with, within the time provided by law, with the possible exception of the service of said Citation. That said cause is now number 107 on the October Term Calendar of this Court. That the matter involved in said

cause, is the title to a quarter section of land, situated in the County of Roberts, State of South Dakota, deeded to Plaintiff in Error by an Indian, pursuant to an Act of Congress.

That as soon as said Writ of Error was allowed and Citation issued, Plaintiff in Error duly filed in the office of the Register of Deeds, in and for said County of Roberts, a Notice of the pendency of this action. That so far as affiant knows, nothing has been done since said Writ of Error was allowed, and Citation issued, relative to said lands or the rights of the parties therein.

M. D. MUNN.

Subscribed and sworn to before me this 22nd day of November, A. D. 1912.

W. C. BRANDT,

Notary Public, Ramsey County, Minn.

My commission expires Nov. 23, 1917.

No. 14.

(22,268)

Supreme Court of the United States

OCTOBER TERM, 1913.

OTTO MONSON,
Plaintiff in Error,

vs.

S. J. SIMONSON,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

M. D. MUNN,
CHESTER L. CALDWELL,
Counsel for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1913.

OTTO MONSON,

Plaintiff in Error,

vs.

S. J. SIMONSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

STATEMENT OF FACTS.

This action was brought to determine the conflicting claims of ownership of the respective parties, to the east half of the northwest quarter (E½ of NW¼), the northeast quarter of the southwest quarter (NE¼ of SW¼) and the northwest quarter of the southeast quarter (NW¼ of SE¼) of section thirty-two (32),

in township one hundred twenty-five (125) north of range fifty (50) west, Roberts County, South Dakota. Both parties claim title under Henry A. Quinn, an Indian allottee, under the Act of Congress approved February 8, 1887, (being 24 U. S. Statutes, 388) known as the Indian Allotment Act. This act provided among other things as follows:

> "Sec. 5. That upon the approval of the allotment provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. Provided, that the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Henry A. Quinn is an Indian of the Sisseton and Wahpeton tribe or band; and during the year 1888 there had been allotted to him as such Indian and member of said tribe, the land above described. This allotment was made pursuant to said Act of Congress of February 8, 1887, and subject to the limitations and

provisions thereof. (See Fols. 9, 10 and also Fol. 34 of the record.)

The Indian Appropriation Bill, passed by Congress on March 3rd, 1905, contained as a rider, among others, this provision:

> "That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the fifth principal meridian, South Dakota." (See Fol. 47 of the record, also 33 U. S. Statutes, 1067, Chapter 479, of the year 1905.)

There were other riders in this same Act, relative to other allotments, all of which with one or two exceptions contained the additional provision: "and all restrictions against the power of alienation are hereby removed." No such provision is contained in the rider authorizing issue of patent to Quinn. No patent was issued under this provision or further proceedings had by the Secretary of the Interior until June 29th, 1905. On May 31st, 1905, said Henry A. Quinn executed and delivered to the defendant in error a deed purporting to convey to the defendant in error the above described land. This deed is Exhibit 2, found at Fol. 20 of the record. Following the execution and delivery of this deed, and on the 29th day of June, 1905, a patent was issued by the United States to said Quinn, covering said land. This patent was issued pursuant to the order of the Secretary of the Interior, deposited in the General Land Office, directing its issuance on the 29th day of June,

1905. This patent is Exhibit One, found at Fol. 13 of the record.

Prior to the issuance of this patent, and after the passage of said Act of Congress authorizing its issuance, said Quinn asked the plaintiff in error to go up and look at this land, stating that he wished to sell it. The plaintiff in error informed said Quinn that he could not purchase said land until after a patent had been issued. Said Quinn then urged plaintiff in error to go up and look at said land, stating that he would pay him for so doing, and would sell it to him afterwards, in case the land proved satisfactory. (See Fols. 49 to 52 of the record.)

Thereupon plaintiff in error did examine said land and on the 21st day of June, 1905, made a contract with said Quinn under which he agreed to purchase said land for the sum of twelve hundred (1200) dollars, after the issuance of said patent. (See Exhibit 6, Fol. 53 of the record.) Following the issuance and delivery of said patent to said Quinn, and on the 10th day of July, 1905, plaintiff in error completed said contract, paid Quinn the full purchase price and received from said Quinn a deed conveying the land above described to plaintiff in error. (See Fols. 56 and 57, also Exhibit 5, Fol. 36 of the record.)

The only question presented in this case is this: Did the passage of the Act of March 3, 1905, without further action on the part of the Secretary of the Interior or the President of the United States, relieve this land and said Quinn from the provisions prohibiting any conveyance or alienation of said land as provided in the Act of February 7, 1887, so that the same could be conveyed by said Quinn prior to the issuance of the fee patent therefor?

ARGUMENT.

The contention of the plaintiff in error is this: that the passage of the rider to the Indian Appropriation Bill of March 3, 1905, did not of itself remove the inhibition contained in the law of 1887 against alienation or transfer of this land by the Indian Quinn. All this rider did was simply to authorize the Secretary of the Interior to issue a patent if it was deemed expedient or wise to do so, in less than twenty-five years, as provided in the Act of 1887, and the prohibition against alienation remained in force until the patent was actually issued. The clause in question in the Act of 1905, and the law of 1887 are *in pari materia*, and must be so construed. It necessarily follows that the President in the exercise of the power conferred upon him by the law of 1887 could have continued the trusteeship over this land for such period as he deemed best, notwithstanding the passage of the Act of 1905.

To state it in another way, the Act of 1905 simply authorized the Secretary of the Interior, with the approval of the President, to issue a fee patent before the expiration of the twenty-five year period named in the Act of 1887, if they deemed it wise to do so; the prohibition against alienation to remain in force until this discretionary power was exercised by these officials and the patent actually issued. Said Quinn was at this time one of a class who are wards of the nation in the condition of pupilage or dependency, and it was the intention of Congress in the passage of said Act of 1905, to adhere to the doctrine recognized by this Court in relation to the Indian tribes in numerous cases.

In the case of *United States against Rickert*, 188 U. S. 432, this Court said:

> "If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the Act of 1887, and the agreement of 1889, ratified by the Act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship."

If the doctrine announced by the Supreme Court of South Dakota prevails, it subverts the policy and purpose of the Indian Allotment Act of 1887, by permitting outsiders to obtain from the allottees, any interest they may have in the allotted lands before the trusteeship created by the Act of 1887 is actually terminated. This is wholly contrary to the purpose and intent of the Allotment Act. It seems to us clear that it was the intention of Congress to have these lands remain subject to the restrictions against alienation as long as the title to the same stood in the Federal Government, and that title remained in the Federal Government until the patent was actually issued. In the case of *U. S. v. Rust*, 168 U. S., quoting from p. 593, this Court said:

> "Where the granting Act specifically provides for the issue of a patent, the rule is that the legal title remains in the Government until the issue of the patent, and while so remaining, the grant is in process of administration, and the jurisdiction of the Land Department is not lost."

This doctrine was fully considered and applied in the case of *U. S. against Gardner,* 133 Fed. 285.

That the prohibition against alienation, as contained in the Act of 1887, remained in full force until the patent was issued is perhaps best illustrated by the question: Could the Secretary of the Interior have declined to issue this patent as authorized by the Act of March 3, 1905, or could the President, as empowered by the Act of 1887 have continued the trusteeship after the passage of said Act of 1905? If so, then the prohibition against alienation must necessarily continue until the patent was actually issued and the discretionary power of the Secretary of the Interior and the President, was terminated. Any other construction would defeat the purpose of Congress as declared in the Act of 1887. If a conveyance could be legally made one month before the patent was issued, it could be one year or more before the issuance even though the President had continued the trust period as authorized in the Act of 1887. It is certain that said Quinn could not have compelled the issuance of a patent under said Act of March 3, 1905, in any proceeding against the Secretary of the Interior, and it seems to us equally clear that the President had the power to continue the trusteeship after the passage of the Act of March 3, 1905, if in his judgment it was wise to do so, in the interest of the ward Quinn.

The Supreme Court of South Dakota held that the deed was not void, and its effect was to vest title in

the defendant in error after the issuance of the patent —that is, the state court holds that the defendant in error has acquired title under the doctrine of the statutes of South Dakota, which provide that any title subsequently acquired by a person executing a warranty deed, vests the title in the grantee, under such deed. Our answer to that is this: if the deed was void when executed and delivered, it always remains so, and no state law or other action by state authorities could impress upon such void deed, any validity. To permit such a thing is to hold that state laws can make valid that which an Act of Congress has declared shall be void, over the subject matter of which Congress has exclusive jurisdiction. The decision of the Supreme Court of South Dakota in this case is found in Vol. 117 N. W. Rep. at p. 133. We give this reference for the convenience of the Court.

In determining whether or not the Act of March 3, 1905, removed the restrictions contained in the Act of 1887, against alienation we call the Court's attention to this important fact: there were thirty-six different provisions contained in the Act of 1905, authorizing the issuance of patents to various Indian wards, and in nearly every instance excepting the Indian Quinn, it is provided in substance that:

> "All restrictions as to sale, incumbrance or taxation of said lands are hereby removed."

The omission of any such provision from the rider authorizing the issuance of a patent to the Indian Quinn is significant, and applying the doctrine relating to the construction of statutes under such conditions, it leads to the inevitable conclusion that Congress did not intend to remove any such restriction from Quinn.

The Supreme Court of South Dakota held that the Act of March 3, 1905,

> "In effect repelled by implication the clause in the Act of 1887, making any conveyance or contract before the expiration of the twenty-five years, absolutely null and void."

That is, the court in order to sustain its position as to the defendant in error's title, found it necessary to add language to the Act of March 3, 1905, not contained therein, namely that it was the intention of Congress to remove the restrictions from Quinn against alienation, and thus add to the statute, the language contained in most of the other provisions of the Act, expressly removing such restrictions.

The Supreme Court of South Dakota thus took a different view from that expressed by this Court, in the case of *United States against Goldberg*, 168 U. S., quoting from page 113, where this court said:

> "No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justifies any judicial addition to the language of the Statute."

It is a well settled doctrine that repeals by implication are not favored; and before any such repeal is recognized by the Court it must clearly appear that such was the intention of the legislative body, either from the language used, or by reason of the wholly repugnant provisions of the two acts in question. Black on Statutory Construction, p. 351, lays down the above proposition in the following language:

> "Repeals by implication are not favored. A statute will not be construed as repealing prior

> acts on the same subject (in the absence of express words to that effect), unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject."

This Court in the case of *Wood v. United States*, 15 Peters, 342, quoting from page 363, said:

> "The question then arises, whether the 66th section of the Act of 1799, ch. 128, has been repealed, or whether it remains in full force. That it has not been, expressly or by direct terms, repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say, by necessary implication; for it is not sufficient to establish, that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication, only pro tanto, to the extent of the repugnancy."

and such has been the rule of this Court ever since.

It is our contention that the language of the Act of March 3, 1905, in relation to the Quinn patent, not only fails to show any intention on the part of Congress to repeal the prohibition against alienation by Quinn, imposed by the law of 1887, but it is wholly consistent with the continuation of such prohibition until the fee patent is finally issued. As already pointed out, the Act of March 3, 1905, is *in pari materia* with the Act of 1887, and it was the duty

of the Supreme Court of South Dakota to give the terms and provisions of both, force and effect, there being no irreconcilability or repugnancy between the Act of 1905 and the continuation of the prohibition against alienation until the patent was issued. It was the duty of the Supreme Court of South Dakota to give force and effect to the prohibitive provision of the Act of 1887 instead of defeating it under the assumed doctrine of repeal by implication.

The decision of the Supreme Court of South Dakota in this case was placed solely on the ground that the Act of March 3, 1905, repealed by implication the prohibition against alienation before the patent is issued, as provided in the law of 1887, and this provision being repealed by implication, the Indian, Quinn, was authorized to execute and deliver a deed before any patent was issued, which would become operative after the issuance of the patent. In this we respectfully submit that the Supreme Court of South Dakota is in error. This is the only question presented on this appeal and to be determined by this Court. If the Supreme Court of South Dakota is in error on this question, and for the reasons submitted in this brief, we submit that it is, its judgment must be reversed and judgment given in favor of the plaintiff in error.

Respectfully submitted,

M. D. MUNN,

CHESTER L. CALDWELL,

Counsel for Plaintiff in Error.

An act of Congress authorizing and empowering the Secretary of the Interior to shorten the period of alienation of an Indian allotment construed in this case as being permissive only and not effecting the removal of the restrictions prior to the actual issuing of the patent by the Secretary.

A deed by an Indian of an allotment subject to restrictions on alienation is absolutely void if made before final patent, even if made after passage of an act of Congress permitting the Secretary of the Interior to issue such patent; nor does the unrestricted title subsequently acquired by the allottee under the patent inure to the benefit of the grantee. *Starr* v. *Long Jim*, 227 U. S. 613.

A state statute cannot make a deed the basis of subsequently acquired title to Indian allotment lands when the Federal statute has pronounced such a deed entirely void.

22 So. Dak. 238, reversed.

THE facts, which involve the title to land allotted to an Indian of the Sisseton and Wahpeton tribe under the act of February 8, 1887, and the effect of subsequent action by Congress in regard thereto on the restrictions against alienation, are stated in the opinion.

Mr. M. D. Munn and *Mr. Chester L. Caldwell* for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit to determine conflicting claims to the title to 160 acres of land in Roberts County, South Dakota. Both parties claim through Henry A. Quinn, an Indian of the Sisseton and Wahpeton tribe, to whom the land was allotted under the act of Congress of February 8, 1887, 24 Stat. 388, c. 119, the fifth section of which, omitting portions not here material, reads as follows:

"That upon the approval of the allotments provided

for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

In 1889, following the approval of the allotment, a trust patent or allotment certificate, conforming to this statute, was duly issued to the allottee; and on March 3, 1905, nine years before the expiration of the trust period, Congress incorporated in the Indian appropriation act of that date (33 Stat. 1048, 1067, c. 1479) the following provision:

"That the Secretary of the Interior is hereby authorized and empowered to issue a patent to Henry A. Quinn for the east half of the northwest quarter, the northeast quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section thirty-two, township one hundred and twenty-five north, range fifty west of the fifth principal meridian, South Dakota."

The land so described is that covered by the allotment, and a patent therefor, passing the full and unrestricted title, was issued to the allottee by the Secretary of the

Interior, June 29, 1905, in the exercise of the authority and power given by this provision.

Upon the trial it appeared that the plaintiff claimed under two warranty deeds from the allottee, one made and acknowledged May 31, 1905, and recorded June 2, following, and the other purporting to have been made May 30, and acknowledged July 3, 1905, but not recorded. The defendant claimed under a deed from the allottee executed and delivered July 10, 1905, and recorded the same day. The matters in controversy were, (1) whether the plaintiff's deed of May 31 was void because made and delivered before the unrestricted patent was issued, (2) the real date of the acknowledgment and delivery of the plaintiff's unrecorded deed and whether it was void for the like reason, and (3) whether the defendant purchased with notice of the plaintiff's claim under the latter deed. That deed was admitted in evidence over the objection of the defendant, and the ruling was made the subject of a special exception.

The trial court found the issues for the plaintiff, and while the finding made no mention of his deed of May 31, it did recite that his unrecorded deed was executed and delivered July 3, 1905; that he was in actual and open possession from that date until after the date of the deed to the defendant; and that the latter purchased with notice of the plaintiff's claim. Upon this finding a judgment was entered quieting the title in the plaintiff, and shortly thereafter a motion to vacate the judgment and for a new trial was interposed by the defendant, supported by divers affidavits purporting to set forth newly discovered evidence tending to discredit the plaintiff's unrecorded deed and the claim that it was acknowledged and delivered July 3, 1905. The motion was denied, and the defendant appealed to the Supreme Court of the State, which affirmed both the judgment and the order denying the motion. 22 So. Dak. 238. The affirmance was put upon

the ground that the plaintiff's deed of May 31 was valid, and, being a warranty deed purporting to convey the land in fee simple, the title subsequently acquired through the unrestricted patent inured to the plaintiff by operation of a statute of the State. Rev. Civil Code, § 947, subd. 4. Reaching that conclusion, the court deemed it unnecessary to consider or decide the questions presented respecting the plaintiff's unrecorded deed and the effect to be given to it.

The Federal question presented for decision by us is, whether the restrictions upon alienation imposed upon the allottee by § 5 of the act of 1887 were instantly removed by the act of March 3, 1905, or remained in force until the issuing of the patent carrying the full and unrestricted title. The defendant sought to maintain the latter view, but the state court sustained the other.

The act of 1887 was adopted as part of the Government's policy of dissolving the tribal relations of the Indians, distributing their lands in severalty, and conducting the individuals from a state of dependent wardship to one of full emancipation with its attendant privileges and burdens. Realizing that so great a change would require years for its accomplishment and that in the meantime the Indians should be safeguarded against their own improvidence, Congress, in prescribing by the act of 1887 a system for allotting the lands in severalty whereby the Indians would be established in individual homes, was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent (*United States* v. *Rickert*, 188 U. S. 432, 436), but is in reality an allotment certificate, declaring that for a period of twenty-five years, or such enlarged period as the President should direct, the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period would

convey to him by patent the fee, discharged of the trust and free of any charge or incumbrance; and, as a safeguard against improvident conveyances or contracts made in anticipation of the ultimate or real patent, it was expressly provided that any conveyance of the land, or any contract touching the same, made before the expiration of the trust period should be absolutely null and void. It is thus made plain that it was the intention of Congress that the title should remain in the United States during the entire trust period, and that, when conveyed to the allottee or his heirs by the ultimate patent at the expiration of that period, it should be unaffected by any prior conveyance or contract touching the land.

It also is plain that, in the absence of further and permissive legislation, the Secretary of the Interior was without authority to shorten the trust period and at once invest the allottee with the title in fee. Recognizing that this was so, and for reasons deemed sufficient, Congress, by the provision in the act of March 3, 1905, clothed the Secretary with such authority with respect to this allotment. That provision says: "The Secretary of the Interior is hereby authorized and empowered to issue a patent" to the allottee. By "patent" is meant, of course, the ultimate patent passing the fee, for the trust patent or allotment certificate had issued sixteen years before. The language of the provision is permissive, not mandatory, and evidently was designed to enable the Secretary to shorten the trust period, by issuing the final patent, if in his judgment it seemed wise, but not to require him to do so. And it is significant that the provision contains no words directly or presently removing the existing restrictions upon alienation, while other kindred provisions in the same act, relating to other allotments, contain the words "and all restrictions as to sale, incumbrance, or taxation of said lands are *hereby* removed." It hardly can be said that the absence of those words in this instance

and their presence in others is not indicative of a difference in meaning and purpose. We conclude that the restrictions upon alienation contained in the act of 1887 were not instantly removed by the act of 1905, but remained in force as to this allotment until the Secretary of the Interior, in the exercise of the authority conferred by the latter act, terminated the trust period by issuing the final patent passing the fee.

As that patent was issued June 29, 1905, and as the deed from the allottee upon which alone the judgment of affirmance was rested was made and delivered May 31, preceding, it follows that this deed was, in the language of the statute, absolutely null and void, and that the title subsequently acquired by the allottee through the final patent could not inure to the plaintiff in virtue of his being the grantee in that deed. See *Starr* v. *Long Jim*, 227 U. S. 613, 624. A state statute could not make it the basis of passing subsequently acquired title when the Federal statute pronounces it entirely void. See *Bagnell* v. *Broderick*, 13 Pet. 436, 450; *Gibson* v. *Chouteau*, 13 Wall. 92, 99.

The judgment is accordingly reversed and the cause remanded, but without prejudice to the power of the Supreme Court of the State to proceed to a determination of the questions which were left open by its opinion. See *Murdock* v. *Memphis*, 20 Wall. 590, 635-636.

Judgment reversed.